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PART II.

THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO THE

OPERATION OF LAW UPON THEM.

THE LAW OF CONTRACTS.

CHAPTER I.

CONSTRUCTION AND INTERPRETATION OF CONTRACTS. (*a*)

Sect. I. — *General Purpose and Principles of Construction.*

The importance of a just and rational construction of every contract and every instrument, is obvious. But the importance of having this construction regulated by law,

(*a*) The terms "interpretation" and "construction" are used interchangeably by writers upon the law. A distinction has been taken between them by Dr. Lieber, in his work upon "Legal and Political Hermeneutics." Interpretation as defined by him is "the art of finding out the true sense of any form of words; that is, the sense which their author intended; and of enabling others to derive from them the same idea which the author intended to convey." On the other hand, "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text — conclusions which are in the spirit, though not within the letter of the text." See Legal and Political Hermeneutics, ch. 1, sec. 8; ch. 3, sec. 2; ch. 4 and ch. 5. *Interpretation* properly precedes construction, but it does not go beyond the written text. *Construction* takes place where texts to be interpreted and construed are to be reconciled with the rules of law, or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument, or determine its application to cases unforeseen and unprovided for. The doctrine of *cy pres* belongs to *construction*. Rules of interpretation and construction should also be carefully distinguished from *rules of law*. See the able note of Mr. Preston, in his edition of Sheppard's Touchstone, p. 88; also per *Parke* and *Rolfe*, BB., in Keightley *v.* Watson, 3 Exch. 716, quoted *ante*, vol. i., pp. 18, 19. It is to be observed also, "that when a general principle for the construction of an instrument is laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner." Per Lord *Eldon*, C. J., in Browning *v.* Wright, 2 Bos. & Pul. 24. And see, to the same effect, the remarks of Lord *Kenyon*, in Walpole *v.* Cholmondely, 7 T. R. 148.

guided always by distinct principles, and in this way made uniform in practice, may not be so obvious, although we think it as certain and as great. If any one contract is properly construed, justice is done to the parties directly interested therein. But the rectitude, consistency, and uniformity of all construction enables all parties to do justice to themselves. For then all parties, before they enter into contracts, or make or accept instruments, may know the force and effect of the words they employ, of the precautions they use, and of the provisions which they make in their own behalf, or permit to be made by other parties.

It is obvious that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or, in other words, is matter of law. And hence arises the very first rule; which is, that what a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. They do not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used, and then direct the jury to apply them at their discretion to the question of construction; nor do they refer to these rules unless they think proper to do so for the purpose of illustrating and explaining their own decision. But they give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take. (*b*)

(*b*) "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error, but a misconstruction by the jury cannot be set right at all effectually." Per *Parke*, B., in Neilson *v.* Harford, 8 M. & W. 806, 823. In Hutchison *v.* Bowker, 5 M. & W. 535, an offer had been made by letter to sell a quantity of "good barley." The letter in reply, after stating the offer, contained the following, — "of which offer we accept, expecting you will give us *fine* barley and good weight." It was *held* that although the jury might find the mercantile meanings of "good," and "fine," as applied to barley, yet they could not go further, and find that the parties did not understand each other. The question whether there was a sufficient acceptance was a question to be deter-

An apparent exception occurs not unfrequently, where unusual, or technical, or official words are used, and their meaning is to be gathered from experts, or from those acquainted with the particular art to which these words refer, or from authoritative definitions. The evidence on this point may be conflicting; and then it presents a question for the jury. But the question is rather analogous to that presented by words obscurely written or half erased, and which may be read in more than one way. In all such cases, it is a question of fact for the jury, what is the word used, or what is its specific meaning in this contract; and it is matter of law what effect this word used with this meaning has upon the construction of the contract. (*c*)

mined by the court, upon a proper construction of the letters. And *Parke*, B., said: — "The law I take to be this, — that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word "*fine*" in the corn market; and the jury having found what it was, the question, whether there was a complete acceptance by the written documents, is a question for the judge" See Perth Amboy Man. Co. *v.* Condit, 1 N. Jer. 659; Rogers *v.* Colt, Id. 704; Brown *v.* Hatton, 9 Ired. 319; Wason *v* Rowe, 16 Verm. 525; Eaton *v.* Smith, 20 Pick. 150; Hitchin *v.* Groom, 5 C. B. 515; Morrell *v.* Frith, 3 M. & W. 402; Rapp *v.* Rapp, 6 Penn. St. 45. The case of Lloyd *v.* Maund, 2 T. R. 760, seems *contra*, but that case was substantially overruled in Morrell *v.* Frith, 3 M. & W. 402. "If I am called on to give an opinion," said *Parke*, B., "I think the case of Lloyd *v.* Maund is not law." — Where the evidence of a contract consists in part of written evidence, and in part of oral communications, or other unwritten evidence, it is left to the jury to determine upon the whole evidence what the contract is. Edwards *v.* Goldsmith, 16 Penn. St. 43; Bomeisler *v.* Dobson, 5 Whart. 398; Morrell *v.* Frith, 3 M. & W. 404, per Lord *Abinger*. — In the case of libel, the meaning of the document forms part of the intention of the parties, and as such intention is a question for the jury, the document is submitted to them, the judge giving the legal definition of the offence. Parmiter *v.* Coupland, 6 M. & W. 108; per *Parker*, C. J., in Pierce *v.* The State, 13 N. H. 536, 562; per Lord *Abinger*, in Morrell *v.* Frith, 3 M. & W. 402. — So on a prosecution for sending a threatening letter, the jury will, upon examination of the paper, decide whether it contains a menace. Rex *v.* Girdwood, 2 East, P. C. 1120, 1 Leach's Crown Cases, 169.

(*c*) "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical, or peculiar sense, it is the province of the court to put a construction upon the written contracts and

The principles of construction are much the same at law and in equity. (*d*) Indeed these principles are of necessity very similar, whether applied to simple contracts, to deeds, or to statutes. There are differences, but in all these cases the end is the same; and that is the discovery of the true meaning of the words used. (*e*)

SECTION II.

OF THE EFFECT OF INTENTION.

The first point is, to ascertain what the parties themselves meant and understood. But however important this inquiry may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit. In other words, courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language, or to the rules of law. (*f*) Words must not be

agreements of parties, according to the established use of language, as applied to the subject-matter, and modified by the whole instrument, or by existing circumstances." Per *Shaw*, C. J., in Eaton *v.* Smith, 20 Pick. 150. And see preceding note.

(*d*) 3 Bl. Com. 434; 1 Fonb. on Eq. 145. n. (*b*); Hotham *v.* East India Co. 1 Dougl. 277; Doe *d.* Long *v.* Laming, 2 Burr. 1108; Eaton *v.* Lyon, 3 Ves. 692; Ball *v.* Storie, 1 Sim. & Stu. 210.

(*e*) "The same sense is to be put upon the words of a contract, in an instrument under seal, as would be put upon the same words in any instrument not under seal; for the same intention must be collected from the same words of a contract in writing, whether with or without a seal." Per Lord *Ellenborough*, in Seddon *v.* Senate, 13 East, 74; Robertson *v.* French, 4 East, 130, 135; per *Tindal*, C. J., in Hargrave *v.* Smee, 3 M. & P. 581; per *Shaw*, C. J., in Kane *v.* Hood, 13 Pick. 282.

(*f*) "Whenever," says *Willes*, C. J., in Parkhurst *v.* Smith, Willes, 332, "it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to

forced away from their proper signification to one entirely different, although it might be obvious that the words used either through ignorance or inadvertence, expressed a very different meaning from that intended. Thus, if a contract spoke of "horses," it would not be possible for a court to read this word "oxen," although it might be made certain by extrinsic evidence that it was so intended. (*g*) So if

the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges (and this is that *astutia* which is so much commended by Lord *Hobart*, p. 277, in the case of the Earl of Clanrickard,) to endeavor to find out such a meaning in the words as will best answer the intent of the parties."

(*g*) This is a rule which should be constantly borne in mind in putting a construction upon any legal instrument. It is admirably expounded by Lord Chief Baron *Eyre*, in the opinion delivered by him before the House of Lords in the great case of Gibson *v.* Minet, 1 H. Bl. 569, 614. One of the questions agitated in that case was, whether a bill of exchange drawn, payable to a fictitious payee, and purporting to be by him indorsed, could be construed as a bill payable to bearer. A majority of the judges who delivered opinions argued in favor of such a construction, and urged, among other arguments, the case of deeds of conveyance, which are frequently made to operate in a manner different from what the parties intended. But the learned Chief Baron delivered a very powerful opinion against adopting the construction in question. After noticing the argument derived from deeds of conveyance, and urging that there was no analogy between them and bills of exchange, he continued: — "But let it be supposed, for the sake of the argument, that there may be some analogy between deeds and bills of exchange; I ask what are the instances in which construction and interpretation have taken so great a liberty with deeds, as to afford an argument by analogy for construing in this case a bill drawn payable to order to be a bill drawn payable to bearer. The instances which had occurred to me, as likely to be insisted upon, do in my apprehension afford no argument in favor of this position. A deed of feoffment upon consideration without livery may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former, and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed which under circumstances may operate as a covenant to stand seised to uses; why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favor of the intended feoffee. The seisin which remains in the feoffor, because the deed is insufficient to pass it, must remain in him, bound by the use. This is the effect of the feoffor's own agreement plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which *his words will bear*. So a deed importing a grant of an interest by two, one entitled in possession, the other in reversion, is, in consideration of law, the grant of the first and the confirmation of the second; why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both that the grantee shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of

parties used in a contract technical words of the law merchant, such as average, or agio, or grace; these words could not be wrested from their customary and established meaning, on the ground that the parties used them in a sense which had never before been given to them. (*h*) But words will be interpreted with unusual extent of meaning, and held to be *generic* rather than *specific*, and thus made to cover things which are collateral rather than identical, if the certain meaning of the parties, and the obvious justice of the case require this extent of signification. Thus the word "men" will be interpreted to mean "mankind," and to include women; (*i*) and the word "bucks" has been construed to include does; and the word "horse" construed to mean "mares." (*j*)

A distinction is to be observed between the construction of a contract and the correction of a mistake. For if it were in proof that the parties had intended to use one word, and that another was in fact used by a mere verbal error in copying or writing, such error might be corrected by a court of equity, upon a bill filed for that purpose, and the instrument so corrected would be looked upon as the contract which

which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance, called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party the law says, that they are words of confirmation, and shall enure as words of confirmation, in order to give effect to his deed, *ut res magis valeat quam pereat*. Here again the construction which the law puts upon the words of the deed is a construction *which the words will bear*. The words have several technical senses, of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense it is true; but if they are interpreted in a manner which the *jus et norma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed, I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances: I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, *that the words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them."

(*h*) See Hutchison *v.* Bowker, 5 M. & W. 535.

(*i*) Bro. Abr. Exposition del Terms, 39.

(*j*) State *v.* Dunnavant, 3 Brev. 9. And see Packard *v.* Hill, 7 Cow. 434, 5 Wend. 375.

the parties had made, and be interpreted accordingly. (*k*) But this jurisdiction is confined strictly to those cases where different *language* has been used from what the parties intended. For if the words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and intended them to bear, still this actual meaning would, generally if not always, be held to be their legal meaning. (*l*) Upon sufficient proof that the contract did not express the meaning of the parties, it might be set aside; but a contract which the parties intended to make, but did not make, cannot be set up in the place of one which they did make, but did not intend to make.

So the rules of law, as well as the rules of language, may interfere to prevent a construction in accordance with the intent of the parties. Thus, if parties agreed that one should pay the other, for a certain consideration, sums of money at various times, "with interest," and it was clear, either from the whole contract or from independent evidence, that the parties meant by this "compound interest," it may be presumed, assuming that a contract for compound interest is unlawful, that no court would admit this interpretation, because if the bargain were expressly for compound interest, it would be invalid. Nor would a contract to pay interest be avoided by evidence that the parties understood compound interest, if it were made in good faith, and for a valid consideration. The law would consider the contract as defining the principal sums due, and then would put upon the word interest its own legal interpretation.

It may be true ethically, that a party is bound by the meaning which he knew the other party to intend, or to believe that he himself intended; (*m*) but certainly this is not

(*k*) Adams's Doctrine of Equity, p. 169, *et seq.*

(*l*) Ibid.

(*m*) "Where the terms of the promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time, the promisee received it." Paley's Mor. and Pol. Philosophy, 104. Where the terms of an instrument are fairly susceptible of the meaning in which the promisor believed they were understood by the promisee, and in which they were actually understood, the rule of Paley is as good in law as in ethics. See an application of the rule in Potter *v.* Ontario and Livingston Mut. Ins. Co. 5 Hill, 147, per *Bronson*, J. In this case, one of the conditions of a fire policy was, that in case the assured

always legally true. Thus, in the cases already supposed, he who was to give might know that the party who was to receive, (a foreigner perhaps, unacquainted with our language,) believed that the promise was for "oxen," when the word "horses" was used; but nevertheless an action *on this contract* could not be sustained for "oxen." So if he who was to pay money knew that the payee expected compound interest, this would not make him liable for compound interest as such, although the specific sums payable were made less, because they were to bear compound interest. In all these cases, it is one question whether an action may be maintained *on the contract so explained*, and another very different question, whether the contract may not be entirely set aside, because it fails to express the meaning of the parties, or is tainted with fraud; and being so avoided, the parties are left to fall back upon the rights and remedies that may belong to their mutual relations and responsibilities. These must be determined by the evidence in the case; and the very contract, which, *as a contract*, could not be enforced, might well be evidence of great importance as to the rights and liabilities of the parties.

It is therefore obvious that it is not enough in every instance to ascertain the meaning of the parties. It is however always true that this is of the utmost importance, and often sufficient to determine the construction. And courts of law have established various rules to enable them to ascertain this meaning, or to choose between possible meanings.

should make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the company, and have the same indorsed on the policy, or *otherwise acknowledged or approved by them in writing*, the policy should cease, and be of no further effect. A further insurance was effected, and notice given to the company. It was answered by the secretary of the company in these words: "I have received your notice of additional insurance." *Bronson*, J., after stating Paley's rule, as above given, says: — "Now how did the defendants apprehend at the time that the plaintiff would receive their answer? If they secretly reserved the right of approval or disapproval at a future period, could they have believed that their written answer would be so received by the plaintiff? I think not. They must have intended the plaintiff should understand from the answer that every thing had been done which was necessary to a continuance of the policy, and consequently that they approved, as well as acknowledged, the further insurance." See also 1 Duer on Ins. 159.

SECTION III.

SOME OF THE GENERAL RULES OF CONSTRUCTION.

The subject-matter of the contract is to be fully considered. (*n*) There are very many words and phrases which have one meaning in ordinary narration or composition, and quite another when they are used as technical words in relation to some special subject; and it is obvious that if this be the subject-matter of the contract, it must be supposed that the words are used in this specific and technical sense.

So, too, the situation of the parties at the time, and of the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract, will often be of great service in guiding the construction; because as has been said, this intention will be carried into effect so far as the rules of language and the rules of law will permit. So the moral rule above referred to may be applicable; because a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties.

Indeed, the very idea and purpose of construction imply a previous uncertainty as to the meaning of the contract; for where this is clear and unambiguous, there is no room for construction, and nothing for construction to do. A court would not, by construction of a contract, defeat the express stipulations of the parties. And if a contract is false to the

(*n*) The King *v.* Mashiter, 1 Nev. & Per. 326, 327. Where an executrix promised to pay a simple contract debt, "when sufficient effects were received" from the estate of the testator; *held*, that this must be understood to mean effects legally applicable to the debt in question, and that the executrix might first pay a bond debt. Bowerbank *v.* Monteiro, 4 Taunt. 844. So, where it was agreed in a charter-party to employ a captured ship, "as soon as sentence of condemnation should have passed," it was *held* that *a legal sentence* was meant. Unwin *v.* Wolseley, 1 T. R. 674. If an annuity be granted to one, "pro concilio impenso et impendendo," (for past and future counsel) if the grantee be a physician, this shall be understood of his advice as a physician, and if he be a lawyer, of his advice in legal matters. Shep. Touch. p. 86. See Littlefield *v.* Winslow, 19 Maine, 394, 398; Sumner *v.* Williams, 8 Mass. 162, 214; Robinson *v.* Fiske, 25 Maine, 401.

actual meaning and purpose of the parties, or of either party, the remedy does not lie in construction, but, if the plaintiff be the injured party, in assuming the contract to be void, and establishing his rights by other and appropriate means; or, if the defendant be injured, by defending against the contract on the ground of fraud or mistake, if the facts support such a defence.

A construction which would make the contract legal is preferred to one which would have an opposite effect; (*o*) and by an extension of the same principle, where certain things are to be done by the contract which the law has regulated in whole or in part, the contract will be held to mean that they should be so done as would be either required or indicated by the law. (*p*)

The question may be whether the words used should be taken in a comprehensive or a restricted sense; in a general or a particular sense; in the popular and common or in some unusual and peculiar sense. In all these cases the court will endeavor to give to the contract a rational and just construction; but the presumption — of greater or less strength, according to the language used, or the circumstances of the case — is in favor of the comprehensive over the restricted, the general over the particular, the common over the unusual sense. (*q*)

(*o*) "It is a general rule," saith Lord *Coke*, "that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Litt. 42, 183. And see Churchwardens of St. Saviour, 10 Rep. 67 b; Archibald *v.* Thomas, 3 Cow. 284; Riley's Adm'rs *v.* Vanhouten, 4 How. (Miss.) 428; Many *v.* Beckman Iron Co. 9 Paige, 188. The same doctrine was declared by Lord *Lyndhurst*, in Shore *v.* Wilson, 9 Cl. & Fin. 397. "The rule," says he, "is this, and it is a fair and proper rule, that where a construction, consistent with lawful conduct and lawful intention can be placed upon the words and acts of parties, you are to do so, and not unnecessarily to put upon these words and acts a construction directly at variance with what the law prohibits or enjoins." — A condition to assign *all offices* is valid, and will be taken to apply to such offices as are by law assignable. Harrington *v.* Kloprogge, 4 Dougl. 5.

(*p*) Clark *v.* Pinney, 7 Cow. 681. In this case there was a contract to deliver Salina salt in barrels; *held*, that such barrels as were directed by statute were to be understood as intended.

(*q*) What Lord *Ellenborough* says with regard to the construction of the policy of insurance, is equally true as to all other instruments, namely, that it must be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood

It is a rule that the whole contract should be considered in determining the meaning of any or of all its parts. (*r*) The

in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. Robertson *v.* French, 4 East, 135. "The best construction," says *Gibson*, C. J., "is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." Schuylkill Nav. Co. *v.* Moore, 2 Whart. 491. — "Becoming insolvent" means a general inability to pay one's debts, not a taking the benefit of the Insolvent Debtors' Act, unless the context so restrains it. Biddlecombe *v.* Bond, 4 Ad. & El. 332; Parker *v.* Gossage, 2 Cr. M. & Ros. 617. See also Lord Dormer *v.* Knight, 1 Taunt. 417; The King *v.* Mainwaring, 10 B. & Cr. 66; Rawlins *v.* Jenkins, 4 Q. B. 419; Caine *v.* Horsfall, 1 Exch. 519; Lowber *v.* Le Roy, 2 Sandf. 202; Denny *v.* Manhattan Co. 2 Hill, 220. The first proposition of Mr. *Wigram*, in his treatise upon the admission of extrinsic evidence in aid of the interpretation of wills, is that, "A testator is always presumed to use the words in which he expresses himself, according to their *strict* and *primary* acceptation, unless from the substance of the will it appears that he used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." If by strict and primary meaning is meant ordinary meaning, the rule needs no qualification. The object of interpretation and construction is to find the intention of the parties, and surely that intention is best sought by affixing to the words of an instrument such meanings as are common or ordinary. Where, however, the law has defined the meaning of words, they must be understood to be used in the sense which the law attaches to them, unless the context or the circumstances of the case indicate that another meaning is the one in which they are used. Thus, the word "child" is understood to mean legitimate child, unless a different meaning is pointed out by the context, or extrinsic facts. Fraser *v.* Pigott, Younge, 354; Wilkinson *v.* Adam, 1 Ves. & B. 422; Gill *v.* Shelley, 2 Rus. & M. 336.

(*r*) Ex antecedentibus et consequentibus fit optima interpretatio. "Every deed," says Lord *Hobart*, "ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only." Trenchard *v.* Hoskins, Winch, 93. And see Sicklemore *v.* Thistleton, 6 M. & S. 9; Washburn *v.* Gould, 3 Story, 122; Chase *v.* Bradley, 26 Maine, 531; Merrill *v.* Gore, 29 Maine, 346; Heywood *v.* Perrin, 10 Pick. 228; Gray *v.* Clark, 11 Verm. 583; Warren *v.* Merrifield, 8 Metc. 96. "It is a true rule of construction that the sense and meaning of the parties, in any particular part of an instrument, may be collected *ex antecedentibus et consequentibus;* every part of it may be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Per Lord *Ellenborough*, in Barton *v.* Fitzgerald, 15 East, 541. In the Duke of Northumberland *v.* Errington, 5 T. R. 522, there was a string of covenants upon the part of the lessees of certain mines, in which they bound themselves, "jointly and severally;" after which followed a covenant of the lessor. There was then a further covenant on the part of the lessees to render an account, which of itself would have bound them only jointly. *Held*, that the words "jointly and severally," at the beginning of the covenants by the lessees, extended to all their subsequent covenants. *Buller*, J., said: — "It is immaterial in what part of a deed any particular covenant is inserted; for in construing it we must take the whole deed into consideration, in order to discover the meaning of the

reason is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and object in view in all of it, and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. Thus, the condition of a bond may be considered to explain the obligatory part. (*s*) And the recital in a deed or agreement has sometimes great influence in the interpretation of other parts of the instrument. (*t*) The contract may be contained in several instruments, which, if made at the same time, between

parties." — Where there are recitals of particular claims or considerations, followed by general words of release, the general words shall be restrained by the particular recital. Thus, if a man should receive ten pounds, and give a receipt for it, and thereby acquit and release the person of *all actions, debts, duties, and demands*, nothing would be released but the ten pounds; because the last words must be limited by those foregoing. 2 Roll. Abr. 409. This case, though said to be denied by Lord *Holt*, in Knight *v.* Cole, 1 Show. 150, 155, was confirmed by Lord *Ellenborough*, in Payler *v.* Homersham, 4 M. & S. 426. See also Ramsden *v.* Hylton, 2 Ves. 310; Lampon *v.* Corke, 5 B. & Ald. 606; Simons *v.* Johnson, 3 B. & Ad. 175; Lyman *v.* Clark, 9 Mass. 235; Rich *v.* Lord, 18 Pick. 325; Jackson *v.* Stackhouse, 1 Cow. 122; McIntyre *v.* Williamson, 1 Edw. Ch. 34. For the construction of *sweeping clauses*, see Moore *v.* Magrath, Cowp. 9. — For the effect of recitals upon the construction of mercantile instruments, see Bell *v.* Bruen, 1 How. 169, 184; Lawrence *v.* McCalmont, 2 How. 426, 449. — In Browning *v.* Wright, 2 Bos. & Pul. 13, A., after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, *and that he had full power, &c., to convey* the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself or any person claiming under him, and lastly, that he, his heirs, and assigns, and all persons claiming under him, should make further assurance. *Held*, that the intervening general words, "full power, &c., to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. See the admirable opinion of Lord *Eldon*. See also Hesse *v.* Stevenson, 3 Bos. & Pul. 565; Nind *v.* Marshall, 3 Moore, 703; Broughton *v.* Conway, Dyer, 240 *a*; Cole *v.* Hawes, 2 Johns. Cas. 203; Whallon *v.* Kauffman, 19 Johns. 97; Barton *v.* Fitzgerald, 15 East, 530; Saward *v.* Anstey, 10 Moore, 55; Chapin *v.* Clemitson, 1 Barb. 311; Mills *v.* Catlin, 22 Verm. 98. — Where, in a statute, general words follow particular ones, the rule is to construe them, as applicable to subjects *ejusdem generis*. Thus, in Sandinam *v.* Breach, 7 B. & Cr. 96, a question arose upon the statute 29 Car. 2, c. 7, which enacts, "that no tradesman, artificer, workman, laborer, or other person or persons, shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord's day." It was contended that under the words "other person or persons" the drivers of stage-coaches were included. *Held* otherwise for the above reason. See The Queen *v.* Nevill, 8 Q. B. 452. — For the application of this rule to deeds of conveyance where there are particular enumerations or descriptions, see Doe *v.* Meyrick, 2 Cr. & Jer. 223; Jackson *v.* Stevens, 16 Johns. 110. — Parts struck out of an instrument may, it seems, be regarded in its construction. Strickland *v.* Maxwell, 2 Cr. & M. 539.

(*s*) Coles *v.* Hulme, 8 B. & Cr. 568.

(*t*) Moore *v.* Magrath, Cowp. 9; Cholmondeley *v.* Clinton, 2 B. & Ald. 625.

the same parties, and in relation to the same subject, will be held to constitute but one contract, (*u*) and the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together. (*v*) And the recitals in each may be explained or corrected by a reference to any other, in the same way as if they were only several parts of one instrument. (*w*)

Another rule requires that the contract should be supported rather than defeated. (*x*) Thus, a deed which cannot operate in the precise way in which it is intended to take effect, shall yet be construed in another, if in this other it can be made effectual. (*y*) Thus, a deed intended for a release,

(*u*) Coldham *v.* Showler, 3 C. B. 312; Makepeace *v.* Harvard College, 10 Pick. 298; Sibley *v.* Holden, Id. 249; Odiorne *v.* Sargent, 6 N. H. 401; Raymond *v.* Roberts, 2 Aikens, 204; Strong *v.* Barnes, 11 Verm. 221; Taylor *d.* Atkyns *v.* Horde, 1 Burr. 60, 117; Jackson *v.* Dunsbagh, 1 Johns. Cas. 91; Hills *v.* Miller, 3 Paige, 254; Sewall *v.* Henry, 9 Ala. 24; Applegate *v.* Jacoby, 9 Dana, 209; Cornell *v.* Todd, 2 Denio, 130. So also, though the instruments are not made at the same time, if they can be connected together by a reference from one to the other. Van Hagen *v.* Van Rensselaer, 18 Johns. 420; Sawyer *v.* Hammond, 15 Maine, 40; Adams *v.* Hill, 16 Maine, 215.

(*v*) Whitehurst *v.* Boyd, 8 Ala. 375; Newhall *v.* Wright, 3 Mass. 138.

(*w*) Sawyer *v.* Hammatt, 15 Maine, 40.

(*x*) Smith *v.* Parkhurst, 3 Atk. 135; Pollock *v.* Stacy, 9 Q. B. 1033. In Pugh *v.* Leeds, Cowp. 714, there was a power to make leases in possession, but not in reversion. A lease was granted for twenty-one years, to commence *from* the day of the date. *Held*, that "from the day, &c.," was to be regarded as inclusive, and not exclusive of the day of the date. Lord *Mansfield* said: — "The ground of the opinion and judgment which I now deliver is that 'from' may, in the vulgar use, and even in the strictest propriety of language, mean either *inclusive* or *exclusive;* that the parties necessarily understood and used it in that sense which made their deed effectual; that the courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning." In Brown *v.* Slater, 16 Conn. 192, the following agreement was entered into: — "Farmington, Oct. 15th, 1825. In consideration of Mrs. Nancy Hart's becoming my wife, I promise to give her at the rate of one dollar per week, from the date of our marriage, so long as she remains my wife. Elias Brown." This contract was put in suit after the death of the husband, and the defence was, that it was extinguished by the marriage of the parties. *Held*, however, that the contract, being made in contemplation of marriage, and purporting to hold forth a benefit to the promisee, a court of law would construe it as providing for the payment of a sum of money to her after the termination of the coverture, the amount to be ascertained by its duration. *Williams*, C. J., said: "If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect. For there is no presumption against the validity of contracts. Nor can we suppose that the parties sit down to make a contract providing for a particular event, when that very event would make it void."

(*y*) Goodtitle *v.* Bailey, Cowp. 600;

which cannot operate as such, may still take effect as a grant of the reversion, as a surrender, or an attornment; or even as a covenant to stand seised. (*z*) So a deed of bargain and sale, void for want of enrolment, has been held to take effect as a grant of the reversion. (*a*) If several grantors join in a deed, some of whom are able to convey and others not, it is the deed of him or them alone who are able. (*b*) And if there be several grantees, one of whom is capable of taking and the others not, it shall enure to him alone who can take. (*c*) So if a mortgagor and mortgagee join, it is the grant of the mortgagee and the confirmation of the mortgagor. (*d*) And if a charter will bear a double construction, and in one sense it can effect its purposes, and in the other not, it will receive the construction which will make it efficacious. (*e*) The court cannot, however, through a desire that there should be a valid contract between the parties, undertake to reconcile conflicting and antagonistic expressions, of which the inconsistency is so great that the meaning of the parties is necessarily uncertain. Nor where the language distinctly imports illegality, should they construe it into a different and a legal sense, for this would be to make a contract for the parties which they have not made themselves. But where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made. So, for the same reason, all the parts of the contract will be construed in such a way as to

Doe *v.* Salkeld, Willes, 673; Haggerston *v.* Hanbury, 5 B. & Cr 101; Wallis *v.* Wallis, 4 Mass. 135; Parker *v.* Nichols. 7 Pick. 111; Russell *v.* Coffin, 8 Id. 143; Brewer *v.* Hardy, 22 Id. 376; Jackson *v.* Blodget, 16 Johns. 172; Rogers *v.* Eagle Fire Ins. Co. 9 Wend. 611; Barrett *v.* French, 1 Conn. 354; Bryan *v.* Bradley, 16 Conn. 474. "The judges in these latter times (and I think very rightly) have gone farther than formerly, and have had more consideration for the substance, to wit, — the passing of the estate according to the intent of the parties, than the shadow, to wit, — the manner of passing it." Per *Willes*, C. J., in Roe *v.* Tranmarr, Willes, 684. See also *ante*, p. 7, n. (*g*).

(*z*) Shep. Touch. 82; Roe *v.* Tranmarr, Willes, 682.

(*a*) Smith *v.* Frederick, 1 Russ. 174, 209; Adams *v.* Steer. Cro. Jac. 210.

(*b*) Shep. Touch. 81, 82.

(*c*) Shep. Touch. 82.

(*d*) Doe *v.* Adams, 2 Cr. & Jer. 232; Doe *v.* Goldsmith, 2 Cr. & Jer. 674; Treport's case, 6 Rep. 15.

(*e*) Molyn's case, 6 Rep 6 a; Churchwardens of St. Saviour, 10 Rep. 67 b.

give force and validity to all of them, and to all of the language used, where that is possible. (*f*) And even parts or provisions which are comparatively unimportant, and may be severed from the contract without impairing its effect or changing its character, will be suppressed as it were, if in that way, and only in that way, the contract can be sustained and enforced. This desire of the law to effectuate rather than defeat a contract, is wise, just, and beneficial. But it may be too strong. And in some instances language is used in reference to this subject which itself needs construction, and a construction which shall greatly qualify its meaning. Thus, Lord C. J. *Hobart* said: — "I do exceedingly commend the judges that are curious and almost subtle, *astute*, (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end,) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." (*g*) Lord *Hale* quotes and approves these words, (*h*) and *Willes*, C. J., quoting *Hale's* approbation, adds his own. (*i*) And yet this cannot be sound doctrine; it cannot be the duty of a court that sits to administer the law, and for no other purpose, to be curious and subtle, or astute, or to invent reasons and make acts, in order to escape from rigid rules. All that can be true or

(*f*) Thus in Evans *v.* Sanders, 8 Port. 497, there was a promise to pay a sum of money Jan. 1st, 1836, "with interest from 1835." *Held*, that the expression "from 1835," in order that it might have some operation, must be construed as meaning from the first of January, 1835. This rule is well illustrated also by a case put by Rutherforth in his Institutes of Natural Law, B. 2, ch. 7. "If a testator," says he, "bequeathes all his plate to his elder son, except one thousand ounces, which he bequeathes to his younger son, and directs that the elder shall, at a certain time, deliver to the younger one thousand ounces of the said plate, of such sort and such pieces as he pleases; this rule would determine the intention of the testator to have been, that his younger son should have the choice of the sort and the pieces. The ambiguous words — of such sort and such pieces as he pleases — would in the contrary construction be needless, and produce no effect. If the choice had been intended for the elder son, the testator would have had no occasion to add these words. For by leaving all his plate to the elder, except one thousand ounces of it, which the elder within a certain time is to deliver to the younger, the sort and pieces to be delivered would of course have been at the option of the elder; since the younger would by the will have had no claim but to a certain weight of plate."

(*g*) Clanrickard *v.* Sidney, Hob. 277.

(*h*) Crossing *v.* Scudamore, 1 Vent. 141.

(*i*) Doe *v.* Salkeld, Willes, 676; Roe *v.* Tranmarr, Id. 684.

wise in this doctrine is, that courts should effectuate a contract or an instrument wherever this can be done by a perfectly fair and entirely rational construction of the language actually used. To do more than this would be to sacrifice to the apparent right of one party in one case, that stedfast adherence to law and principle, which constitutes the only protection and defence of all rights, and all parties.

Another rule requires that all instruments should be construed "*contra proferentem*." That is, against him who gives or undertakes, or enters into an obligation. (*j*) This rule of construction is reversed in its application to the grants of the sovereign; for these are construed favorably to the sovereign, although he is grantor. (*k*) The reason of the

(*j*) Windham's case, 5 Rep. 7 b; Chapman *v.* Dalton, Plowd. 289; The Ada, Davcis, 407; Thrall *v.* Newell, 19 Verm. 202; per *Alderson*, B, in Meyer *v.* Isaac, 6 M. & W. 612. This rule of construction, — *verba chartarum fortius accipiuntur contra proferentem*, — is well illustrated by the case of Dann *v.* Spurrier, 3 B. & P. 399, in which it was *held* that a lease to one, "to hold for seven, fourteen, or twenty-one years," gave to the lessee, and him alone, the option at which of the periods named the lease should determine. See also Doe *v.* Dixon, 9 East, 15. — The construction of grants should be favorable to the grantee. Throckmerton *v.* Tracy. Plow. 154, 161; Doe *v.* Williams, 1 H. Bl. 25; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 589; Jackson *v.* Blodget, 16 Johns. 172; Melvin *v.* Proprietors, &c., on Mer. River, 5 Mete. 15, 27; Cocheco Man. Co. *v.* Whittier, 10 N. H. 305; Lincoln *v.* Wilder, 29 Maine, 169; Mills *v.* Catlin, 22 Verm 98; Winslow *v.* Patten, 34 Maine, 25. This construction, however, must be a fair and just one, for "there is a kind of equity in grants, so that they shall not be taken unreasonably against the grantor, and yet shall with reason be extended most liberally for the grantee." Per *Saunders*, J., in Throckmorton *v.* Tracy, Plowd. 161.

(*k*) Willion *v.* Berkley, Plowd. 243; Jackson *v.* Reeves, 3 Caines, 293. They shall, however, "have no strict or narrow interpretation for the overthrowing of them," but "a liberal and favorable construction for the making of them available in law, *usque ad plenitudinem*, for the honor of the king." 2 Inst. 496. "And so note," saith Lord *Coke*, "the gravity of the ancient sages of the law to construe the king's grant beneficially for his honor, and the relief of the subject, and not to make any strict or literal construction in subversion of such grants." Molyn's case, 6 Rep. 6 a. See also Churchwardens of St. Saviour, 10 Rep. 67 b. Accordingly, the rule in question is of less weight than the rule that an instrument should be supported rather than defeated; and is not applied to defeat a contract entirely, but only to limit the extent of the grant; for a grantor, whether king or subject, is always held to have intended something by his grant. "It is a well-known rule, in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails, in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king and against the grantee. The rule is not disputed. But it is of very limited application. To what cases does it apply? To such cases only where there is a real doubt, where the grant admits of two intepretations, one of which is more extensive and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpreta-

rule "*contra proferentem*" is, that men may be supposed to take care of themselves, and that he who gives, and chooses the words by which he gives, ought rather to be held to a strict interpretation of them than he who only accepts. (*l*) But the reason is not a very strong one, nor is the rule of special value. It is indeed often spoken of as one not to be favored or applied unless other principles of interpretation fail to decide a question. (*m*) It is of course most applicable

tions, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law) 'that it will be more for the *benefit* of the subject and the *honor* of the king, which is more to be regarded than his profit.' 10 Co. 67 b. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced." Per *Story*, J., Charles River Bridge *v.* Warren Bridge, 11 Pet. 591, 597. It is laid down by Mr. Justice *Story*, that the grants of the sovereign are construed against the grantee only in cases of mere donation, and not where there is a valuable consideration; that the rule has no application in cases of legislative grants. 11 Pet. 597, 598. It is just and reasonable that the construction should be favorable to the grantee, in the case of a conveyance of lands by the sovereign for a valuable consideration; but where exclusive privileges are given to an individual or to a company, and rights conferred restrictive of those of the public, or of private persons, the construction, in cases of doubt or ambiguity, is against the grantee, especially where burdens are imposed upon the public, as in the case of rates of toll imposed for the benefit of a company. In Stourbridge Can. Co. *v.* Wheeley, 2 B. & Ad. 792, where a right of taking toll was given to a company, Lord *Tenterden* used the following language: "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the act." Blakemore *v.* Glamorganshire Can. Nav. 1 Myl. & K. 154, 162, per Lord *Eldon*; Gildart *v.* Gladstone, 11 East, 674, 685; Leeds and Liverpool Can. Co. *v.* Hustler, 1 B. & Cr. 424; Barrett *v.* Stockton, &c. Railway Co. 2 M. & Gr. 135; Parker *v.* Great Western Railway Co. 7 M. & Gr. 253; Mohawk Bridge Co. *v.* Utica & Sch. R. R. Co. 6 Paige, 554. In Priestley *v.* Foulds, 2 M. & Gr. 194, in the case of a legislative grant to a company such as those above mentioned, *Coltman*, J., said: — "The words of the act must be considered as the language of the company, which ought to be construed *fortius contra proferentem*." —This rule of construction, "*contra proferentem*," is applied in pleading. Bac. Max. Reg. 3; but is not applied to wills; nor to statutes, verdicts, judgments, &c., which are not words of parties. Ib.

(*l*) Per *Alderson*, B., in Meyer *v.* Isaac, 6 M. & W. 612.

(*m*) "It is to be noted," saith Lord *Bacon*, "that this rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules which are of more equity and humanity." Bac. Max. Reg. 3. See also Love *v.* Pares, 15 East, 80. So

to deeds poll, (*n*) as if tenant in fee simple grants an estate "for life," it is held to be for the life of the grantee. (*o*) Where there is an indenture, the words may be taken as the words of both parties. But if in fact one gives and the other receives, the same rule applies as in case of deeds poll. (*p*) As if two tenants in common grant a rent of twenty shillings, the grantee takes forty, or twenty from each; but if they reserve in a lease twenty shillings, they take only the twenty, or ten each. (*q*) And in general, if a deed may inure to several different purposes, he to whom it is made may elect in what way to take it. (*r*) Thus, if an instrument may be

in Adams *v.* Warner, 23 Verm. 411, 412, Mr. Justice *Redfield* said: — "This rule of construction is not properly applicable to any case, but one of strict *equivocation*, where the words used will bear either one of two or more interpretations equally well. In such a case, if there be no other legitimate mode of determining the equipoise, this rule might well enough decide the case. In all other cases, where this rule of construction is dragged in by way of argument — and that is almost always where it happens to fall on the side which we desire to support — it is used as a mere make-weight, and is rather an argument than a reason." See also Doe *v.* Dodd, 5 B. & Ad. 689.

(*n*) The reason given in the books for the application of this rule to deeds poll, and not to indentures, is that in deeds poll the words are the words of the grantor alone, while in indentures they are the words of both parties. 2 Bl. Com. 380; Browning *v.* Beston, Plowd. 134. The distinction seems, however, to be in a good degree without foundation. It is true that the words of a deed poll are the words of the grantor alone, but it is not true that the words of an indenture are the words of both parties in any such sense as to make the rule in question inapplicable. See *Gawdy, arguendo*, in Browning *v.* Beston, Plowd. 136. Words of exception or reservation in any instrument are regarded as the words of the party in whose favor the exception or reservation is made. Lofield's case, 10 Rep. 106 b; Hill *v.* Grange, Plowd. 171; Blackett *v.* Royal Exch. Ass. Co. 2 Cr. & Jer. 244, 251; Donnell *v.* Columbian Ins. Co. 2 Sumn. 366, 381; Palmer *v.* Warren Ins. Co. 1 Sto. 360. And they would be construed against such party. Ib.; Cardigan *v.* Armitage, 5 B. & Cr. 197; Bullen *v.* Denning, 5 B. & Cr. 842; Jackson *v.* Hudson, 3 Johns. 387; House *v.* Palmer, 9 Geo. 497; Jackson *v.* Lawrence, 11 Johns. 191. Separate covenants in an indenture on the part of the lessor and lessee, and indeed any stipulation on the part of either party to an agreement, would be regarded as the covenants and stipulations of the party bound to do the thing agreed upon, and the rule of construction "*contra proferentem*" would apply to such cases, subject to all the limitations which properly belong to it. "It is certainly true," says Lord *Eldon*, "that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation that a due regard must be paid to the intention of the parties, as collected from the whole context of the instrument." Browning *v.* Wright, 2 B. & Pul. 22; Earl of Shrewsbury *v.* Gould, 2 B. & Ald. 487, 494; Barton *v.* Fitzgerald, 15 East, 530, 546.

(*o*) Co. Litt. 42 a.

(*p*) See *supra*, n. (*n*).

(*q*) Browning *v.* Beston, Plowd. 140; Throckmerton *v.* Tracy, Id. 161; Hill *v.* Grange, Id. 171; Chapman *v.* Dalton, Id. 289; Shep. Touch. 98; Co. Lit. 197 a.

(*r*) Shep. Touch. 83; Heyward's case, 2 Rep. 35 b; Jackson *v.* Hudson, 3 Johns. 387; Jackson *v.* Blodget, 16 Johns. 172, 178.

either a bill or promissory note, the holder may elect which to consider it. (*s*) So if a carrier gives two notices limiting his responsibility, he is bound by that least favorable to himself. (*t*) So a notice under which one claims a general lien is to be construed against the claimant. The same rule, we think, applies to the case of an accepted guaranty, though upon this point the authorities are somewhat conflicting. (*u*)

(*s*) Edis *v.* Bury, 6 B. & Cr. 433; Block *v.* Bell, 1 Mood. & Rob. 149; Miller *v.* Thompson, 4 Scott, N. R. 204.

(*t*) Munn *v.* Baker, 2 Stark. 255. See also *ante*, vol. 1, p. 719, n. (*i*).

(*u*) Some judges have been of opinion that the contract of guaranty is a contract *strictissimi juris*, and to be construed in favor of the guarantor. Thus, in Nicholson *v.* Paget, 1 Cr. & M. 48, where the words were, "I hereby agree to be answerable for the payment of £50 for B., in case B. does not pay for the gin, &c., which he receives from you, and I will pay the amount," the Court of Exchequer held that this was not a continuing guaranty. And *Bayley*, B., said: — "This is a contract of guaranty, which is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person; and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. . . . . It is not unreasonable to expect, from a party who is furnishing goods on the faith of a guaranty, that he will take the guaranty in terms which shall plainly and intelligibly point out to the party giving the guaranty the extent to which he expects that the liability is to be carried." And see to the same effect Melville *v.* Hayden, 3 B. & Ald. 593. On the other hand, in the later case of Meyer *v.* Isaac, 6 M. & W. 605, 4 Jur. 437, the counsel for the defendant having cited Nicholson *v.* Paget, *Parke*, B., said: — "Can you find any other authority in favor of that rule of construction? It certainly is at variance with the general principle of the common law, that words are always to be taken most strongly against the party using them. Here is a guaranty in the shape of a letter written by the defendant, with the view of inducing the plaintiff to give credit to a particular person. Now, a guaranty is one of that class of obligations which is only binding on one of the parties when the other chooses by his own act to make it binding on him also. This instrument only contains the words of one of the parties to it, namely, of the defendant; and does not affect the plaintiff until he acts upon it by supplying the goods." And *Alderson*, B., in delivering the judgment of the court, said: — "There is considerable difficulty in reconciling all the cases on this subject; which principally arises from the fact that they are not quite at one on the principle to be followed in deciding questions of this sort; some laying it down that a liberal construction ought to be made in favor of the person giving the guaranty; and others that it ought to be in favor of the party to whom it is given, which was the rule adopted by the Court of Queen's Bench in Mason *v.* Pritchard. Now, the generally received principle of law is, that the party making any instrument should take care so to express the nature of his own liability, as that he may not be bound beyond what it was his intention he should be, and, on the other hand, that the party who receives the instrument, and on the faith of it parts with his goods, which he would not, perhaps, have parted with otherwise, and is, moreover, not the person by whom the words of the instrument constituting the liability are used at all, should have that instrument construed in his favor. If, therefore, I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in Mason *v.* Pritchard, than with the opinion of *Bayley*, B., in Nicholson *v.* Paget." See also Mason *v.* Pritchard, 12 East, 227; Hargreave *v.* Smee, 6 Bing.

In cases of mutual gift or mutual promise, where neither party is more the giver or undertaker than the other, this rule would have no application. (*v*) Nor does it seem that it is permitted to affect the construction when a third party would be thereby injured. As if tenant in tail make a lease "for life" generally, this shall be construed to be a lease for the life of the lessor, that the reversioner may not suffer. (*w*) Another reason is, that a tenant in tail cannot legally grant a lease for another's life, and the rule of Lord *Coke* is applied; namely, that an intendment which stands with the law shall be preferred to one which is wrongful and against the law. (*x*) This rule, that words shall be construed "*contra proferentem*," was, says Lord *Bacon*, "drawn out of the depth of reason;" (*y*) but we have already intimated that it is among those principles of interpretation which have the least influence or value.

No precise form of words is necessary even in a specialty. (*z*) Thus, words of recital in a deed will constitute an

244. And see *ante*, vol. I, p. 508, and notes.

(*v*) Co. Litt. 42 a, 183 a. The condition of an obligation is considered as the language of the obligee, and so is construed in favor of the obligor. In the language of *Baldwin*, C. J., and *Fitzherbert*, J., in Bold *v.* Molineux, Dyer, 14 b, 17 a, "every condition of an obligation is as a defeasance of the obligation, as well as if the obligation were single, and after the obligee made indentures of defeasance, and it is all one, for the condition is the assent and agreement of the obligee, and made for the benefit of the obligor; and for that reason it shall always be taken most favorably for the obligor: as if a man be bound in an obligation to pay ten pounds before such a [feast] day, the obligor is not bound to pay it till the last instant of the next day preceding the feast, for he hath all that time for his liberty of payment. So is the law, if I be bound to you on condition to pay ten pounds before the feast of St. Thomas, and there are two feasts of St. Thomas, the latest feast is that before which I am bound to pay, and not sooner, for that is most for my advantage." So also Shep. Touch. 375, 376; Powell on Contracts, 396, 397; Laughter's case, 5 Rep. 21 b.

(*w*) Co. Litt. 42 a.

(*x*) See *ante*, p. 12, n. (*o*).

(*y*) Bac. Max. Reg. 3.

(*z*) "In our law," says *Catline*, Sergeant, *arguendo*, in Browning *v.* Beston, Plowd. 140, "if any persons are agreed upon a thing, and words are expressed or written to make the agreement, although they are not apt and usual words, yet if they have substance in them tending to the effect proposed, the law will take them to be of the same effect as usual words; for the law always regards the intention of the parties, and will apply the words to that which, in common presumption, may be taken to be their intent. And such laws are very commendable. For if the law should be so precise, as always to insist upon a peculiar form and order of words in agreements, and would not regard the intention of the parties when it was expressed in other words of substance, but would rather apply the intention of the parties to the order and form of words than the words to the intention of the parties, such law would be more full of form than of substance. But our law, which is the most reason-

agreement between the parties on which an action of covenant may be maintained. (*a*) And the recital in a deed of a previous agreement is equivalent to a confirmation and renewal of the agreement. (*b*) And words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties. (*c*) And even words of reservation and exception in a lease have been held to operate as a grant of a right. (*d*) So a license may have effect as a grant of an incorporeal hereditament, if it be sealed and delivered, and authorizes the party to whom it is made to go on the licensor's land, and make some use of the land to his own profit. Not so if it be only a license to do some particular act, as to hunt in a man's park. The distinction between these is not always obvious; and the same license may operate as a grant as to some things, and as a mere license as to other things. (*e*)

able law upon earth, regards the effect and substance of words more than the form of them, and takes the substance of words to imply the form thereof, rather than that the intent of the parties should be void."

(*a*) Severn *v.* Clerk, 2 Leon. 122.

(*b*) Barfoot *v.* Freswell, 3 Keb. 465; Saltoun *v.* Houstoun, 1 Bing. 433; Sampson *v.* Easterby, 9 B. & Cr. 505.

(*c*) Clapham *v.* Moyle, 1 Lev. 155, 1 Keb. 842; Shep. Touch. 122; Haff *v.* Nickerson, 27 Maine, 106. "Where the language of an agreement can be resolved into a covenant, the judicial inclination is so to construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these it is not permitted to work the destructive effect the law otherwise attributes to it." Per *Bell*, J., in Paschall *v.* Passmore, 15 Penn. St. 295, 307.

(*d*) Thus, in Wickham *v.* Hawker, 7 M. & W. 63, A. and B. conveyed to D. and his heirs certain lands, *excepting and reserving* to A., B., and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl: *Held*, that this was not in law a *reservation* properly so called, but a *new grant* by D. (who executed the deed) of the liberty therein mentioned, and therefore that it might inure in favor of C. and his heirs, although he was not a party to the deed. See also Doe *d.* Douglas *v.* Lock, 2 Ad. & El. 705, 743.

(*e*) Wood *v.* Leadbitter, 13 M. & W. 845; Woodward *v.* Seely, 11 Ill. 157; Cook *v.* Stearns, 11 Mass. 533. The distinction between a license which is coupled with a grant, and a license which operates merely as a license, is admirably stated by Lord Chief Justice *Vaughan*, in Thomas *v* Sorrell, Vaugh. 330, 351. "A dispensation or license," says he, "properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed, and tree cut down, they are grants. So to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the ac-

Even a bond may be made without the words "held and firmly obliged," although they are technical and usual. Any writing under seal which acknowledges a debt, or indicates that the maker intends to be bound to the payment of a definite sum of money, would be construed as a bond. (*f*)

A question, to which we have already alluded, whether parties have by a certain instrument made a lease, or only an agreement for a future lease, sometimes presents very considerable difficulty. There do not seem to be any fixed and precise rules which will always suffice to decide this question. Indeed, each case must be determined upon its own merits; and little more can be said by way of rule, than that wherever the obvious and natural interpretation of the words used would indicate the intention of the party actually in possession to divest himself thereof forthwith, in favor of the other who is to come into possession under him for a definite time, these words will constitute an actual lease for years, although the words used may be more proper to a release or covenant, or to an agreement for a subsequent lease. But if the whole instrument, fairly considered, indicates that it is only the purpose and agreement of the parties hereafter to make such a lease, then it must be construed as only such agreement, although some of the language might indicate a present lease. (*g*)

tions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and in the wood burnt, so as in some cases by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

(*f*) Dodson *v.* Kayes, Yelv. 193; Core's case, Dyer, 20 a.

(*g*) "It may be laid down for a rule," says Lord Chief Baron *Gilbert*, "that whatever words are sufficient to explain the intent of the parties, that the one shall devest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; and on the contrary, if the most proper and authentic form of words, whereby to describe and pass a present lease for years, are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties: for a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accord-

All legal instruments should be grammatically written, and should be construed according to the rules of grammar. But this is not an absolute rule of law. On the contrary, it is so far immaterial in what part of an instrument any clause is written, that it will be read as of any place and with any context, and if necessary, transposed, in order to give effect to the certain meaning and purpose of the parties. (*h*) Still this will be done only when their certain and evident intent requires it. Inaccuracy or confusion in the arrangement of the parts and clauses of an instrument is therefore always dangerous, because the intent may in this way be made so uncertain as not to admit of a remedy by construction. (*i*) Generally all relative words are read as referring to the nearest antecedent. (*j*) But this rule of grammar is not a rule of law, where the whole instrument shows plainly that a reference was intended to an earlier antecedent. (*k*)

ingly." Bac. Abr. Tit. Leases, (K). See also, for a full discussion of this subject and an analysis of the cases, Platt on Leases, Pt. 3, ch. 4, sec. 3; Taylor's Landlord and Tenant, § 37, *et seq.*

(*h*) Per *Buller*, J., in Duke of Northumberland *v.* Errington, 5 T. R. 526. Thus, if a man in the month of February make a lease for years, reserving a yearly rent payable at the feasts of St. Michael the Archangel, [Sept. 29] and the Annunciation of our Lady, [March 25] during the term, the law shall make transposition of the feasts, viz., at the feasts of the Annunciation and Saint Michael the Archangel, that the rent may be paid yearly during the term. Co. Litt. 217 b. See also 1 Jarman on Wills, 437, *et seq.*

(*i*) "Note reader," saith Lord *Coke*, "although *mala grammatica non vitiat instrumenta*, yet *in expositione instrumentorum mala grammatica, quod fieri possit, vitanda est.*" Finch's case, 6 Rep. 39.

(*j*) Com. Dig. Tit. Parols, (A. 14); Jenk. Cent. 180; Bold *v.* Molineux, Dyer, 14 b; Baring *v.* Christie, 5 East, 398; Rex *v.* Inhabitants of St. Mary's, 1 B. & Ald. 327.

(*k*) Guier's case, Dyer, 46 b; Carbonel *v.* Davies, 1 Strange, 394; Staniland *v.* Hopkins, 9 M. & W. 178, 192; Gray *v.* Clark, 11 Verm. 583. Where A. demises to B. for the term of *his* natural life, the demise is, *primâ facie*, for the life of B. But where A. demised to B., *his executors and administrators*, for the term of *his* natural life, and the lease contained a covenant by A. for the quiet enjoyment of the premises by B., his executors, &c., during the natural life of A., it was *held* that the word "his" in the demising clause must be referred to A., the grantor, and not to B., though his name was the last antecedent. Doe *v.* Dodd, 5 B. & Ad. 689. In *scire facias* against bail, the notice to the defendant was dated on the 3d day of October, 1842, and stated that the execution was returnable on the 3d Tuesday of October *next*. *Held*, that the word "next" referred to the 3d Tuesday of the month, and not to the month, and that it was sufficient. Nettleton *v.* Billings, 13 New Hamp. 446. See Osgood *v.* Hutchins, 6 Id. 374; Prescot *v.* ———, Cro. Jac. 646; Buckley *v.* Guildbank, Id. 678; Bunn *v.* Thomas, 2 Johns. 190; Tompkins *v.* Corwin, 9 Cow. 255. The rule is, *ad proximum antecedens fiat relatio, si sententia non impediat.* Bold *v.* Molineux, Dyer, 14 b.

So, as a general proposition, where clauses are repugnant and incompatible, the earlier prevails in deeds and other instruments *inter vivos*, if the inconsistency be not so great as to avoid the instrument for uncertainty. (*l*) But in the construction of wills, it has been said that the latter clause prevails, on the ground that it is presumed to be a subsequent thought or purpose of the testator, and therefore to express his last will. (*m*)

An inaccurate description, and even a wrong name of a

(*l*) Shep. Touch. 88; Cother *v.* Merrick, Hardr. 94; Carter *v.* Kungstead, Owen, 84; Doe *v.* Biggs, 2 Taunt. 109. In the body of a deed of settlement were these words: — "£1,000 sterling, lawful money of Ireland." The Vice-Chancellor, in giving judgment in the case, said: — "It being then impossible to affix a meaning to the words, 'sterling lawful money of Ireland,' taken altogether, I must deal with them according to the rule of law as to construing a deed, which is, that if you find the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter." Cope *v.* Cope, 15 Sim. 118. See White *v.* Hancock, 2 C. B. 830; Hardman *v.* Hardman, Cro. Eliz. 886; Youde *v.* Jones, 13 M. & W. 524, 534. If any thing be granted generally, and there follow restrictive words, which go to destroy the grant, they are rejected as being repugnant to that which is first granted. See Stukeley *v.* Butler, Hob. 168, 172, 173, Moore, 880. Not so, however, where the words that follow are only explanatory, and are not repugnant to the grant; as in case of a feoffment of two acres, *habendum* the one in fee, and the other in tail, the *habendum* only explains the manner of taking, and does not restrain the gift. Jackson *v.* Ireland, 3 Wend. 99; 23 Am. Jur. 277, 278. Where the condition of a bond for the payment of money is, that the bond shall be void if the money is *not* paid, it is *held* that the condition is void for repugnancy. Mills *v.* Wright, 1 Freem. 247; S. C. *nom.* Wells *v.* Wright, 2 Mod. 285; Wells *v.* Tregusan, 2 Salk. 463, 11 Mod. 191; Vernon *v.* Alsop, 1 Lev. 77, Sid. 105; Gully *v.* Gully, 1 Hawks, 20; Stockton *v.* Turner, 7 J. J. Marsh. 192. In 39 H. 6, 10 a, pl. 15, it is said by *Littleton* to have been adjudged that such a condition was good, and that a plea to an action on the bond, that the defendant had not paid the money, was a good bar. And *Prisot* affirmed the case, and said that he was of counsel in the matter when he was sergeant. But that decision cannot now be considered as law. Where, however, the payee of a note, at the time it was signed by the makers, and as a part of the same transaction, indorsed thereon a promise "not to compel payment thereof, but to receive the amount when convenient for the promisors to pay it," it was *held* that the indorsement must be taken as part of the instrument, and that the payee never could maintain an action thereon. Barnard *v.* Cushing, 4 Mete. 230. It has been laid down, that where A. grants land to B., and afterwards in the same deed he grants the same land to C., the grantee first named takes the whole land. Jenk. Cent. 256. If the inconsistency between parts of an instrument is such as to render its meaning wholly uncertain and insensible, it will be void. Doe *v.* Fleming, 5 Tyrw. 1013.

(*m*) Shep. Touch. 88; Co. Litt. 112 b; Paramour *v.* Yardley, Plowd. 541; Doe *v.* Biggs, 2 Taunt. 109; Constantine *v.* Constantine, 6 Ves. 100; Sherratt *v.* Bentley, 2 My. & K. 149; 1 Jarm. on Wills, 411. "If I devise my land to J. S., and afterwards by the same will I devise it to J. D., now J. S. shall have nothing, because it was my last will that J. D. should have it." Per *Anderson*, C. J., in Carter *v.* Kungstead, Owen, 84. But see, as to this doctrine, Paramour *v.* Yardley, Plowd. 541, n. (*d*); Co. Litt. 112 b, n. (1); 23 Am. Jur. 277, 278.

person, will not necessarily defeat an instrument. But it is said that an error like this cannot be corrected by construction, unless there is enough beside in the instrument to identify the person, and thus to supply the means of making the correction. That is, taking the whole instrument together, there must be a reasonable certainty as to the person. It is also said, that only those cases fall within the rule in which the description so far as it is false applies to no person, and so far as it is true applies only to one. But even if the name or description, where erroneous, apply to a wrong person, we think the law would permit correction of the error by construction, where the instrument, as a whole, showed certainly that it was an error, and also showed with equal certainty how the error might and should be corrected. (*n*)

The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications the want of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. (*o*) If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is, that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make express provision, the reason of the implication fails. If the parties expressly provided not any thing different, but the very same thing which the law would have implied, now this provision may be regarded as made twice; by the parties and by the law. And as one of these is surplusage, that made by the parties is deemed to be so; and hence is derived another rule of construction, to wit, that the expression of those things which the law implies works nothing. (*p*)

(*n*) See Broom's Legal Maxims, 2d ed. p. 490, *et seq.* We shall consider this subject more fully hereafter.

(*o*) *Expressum facit cessare tacitum.* Co. Litt. 210 a; Goodall's case, 5 Rep. 97.

(*p*) Therefore, if the king make a lease for years, rendering a rent payable at his receipt at Westminster, and grant the reversion to another, the grantee shall demand the rent upon the land, for the law, without express words im-

If, however, there be many things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this even if the law would have implied all, if none had been enumerated. (*q*) It follows, therefore, that implied covenants are controlled and restrained within the limits of express covenants. Thus, in a lease, the word "demise" raises by legal implication a covenant both of title in the lessor and of quiet enjoyment by the lessee. But if with the word "demise" there is an express covenant for quiet enjoyment, there is then no implied covenant for title. (*r*) So a mortgage by law passes all the fixtures of shops, foundries, and the like, on the land mortgaged; but if the instrument enumerates a part, without words distinctly referring to the residue, or requiring a construction which shall embrace the residue, no fixtures pass but those enumerated. (*s*) So where in a charter-party the shipper covenanted to pay freight for goods "delivered at A.," and the ship was wrecked at B., and the defendant there accepted his goods, he was still held not bound to pay freight *pro rata itineris*; (*t*) although he would, under a common charter-party or bill of lading, be bound to pay freight for any part of the transit performed, if at the end of that part he accepted the goods. (*u*)

Instruments are often used which are in part printed and in part written; that is, they are printed with blanks, which are afterwards filled up; and the question may occur, to which a preference should be given. The general answer is, to the written part. What is printed is intended to apply to large classes of contracts, and not to any one exclusively; the blanks are left purposely that the special statements or provisions should be inserted, which belong to this contract and

plies that the lessee in the king's case must pay the rent at the king's receipt; and *expressio eorum quæ tacite insunt nihil operatur*. Boroughes's case, 4 Rep. 72 b; Co. Litt. 201 b. See also Co. Litt 191 a; Ives's case, 5 Rep. 11.

(*q*) This is in accordance with the maxim, *expressio unius est exclusio alterius*. Co. Litt. 210 a. See also Hare *v.* Horton, 5 B. & Ad. 715; The King *v.* Inhabitants of Sedgley, 2 B. & Ad. 65.

(*r*) Noke's case, 4 Rep. 80 b; Merril *v.* Frame, 4 Taunt. 329; Line *v.* Stephenson, 4 Bing. N. C. 678, 5 Id. 183.

(*s*) Hare *v.* Horton, 5 B. & Ad. 715.

(*t*) Cook *v.* Jennings, 7 T. R. 381.

(*u*) Luke *v.* Lyde, 2 Burr. 882; Mitchell *v.* Darthez, 2 Bing. N. C. 555.

not to others, and thus discriminate this from others. And it is reasonable to suppose that the attention of the parties was more closely given to those phrases which they themselves selected, and which express the especial particulars of their own contract, than to those more general expressions which belong to all contracts of this class. (*v*)

SECTION IV.

ENTIRETY OF CONTRACTS.

The question whether a contract is entire or separable is often of great importance. Any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. (*w*) And the same rule holds where

(*v*) Robertson *v.* French, 4 East, 130, 136; Alsager *v.* St. Katharine's Dock Company, 14 M. & W. 794; per *Oakley*, C. J., in Weisser *v.* Maitland, 3 Sandf. 318.

(*w*) This point is well illustrated by the case of Johnson *v.* Johnson, 3 B. & P. 162. In that case the plaintiff had purchased from the same persons two parcels of real estate, the one for £700, the other for £300, and had taken one conveyance for both. After having paid the purchase-money and taken possession, he was evicted from the smaller parcel, in consequence of a defect in the title derived under the purchase, and thereupon brought an action for money had and received to recover back the £300, at the same time refusing to give up the parcel of land for which £700 had been paid. And the court *held* that he was entitled to recover. Lord *Alvanley*, in delivering the judgment of the court, said: — "My difficulty has been, how far the agreement is to be considered as one con-

the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. (*x*) But the mere fact that

tract for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain. This for a time occasioned doubts in my mind; for if the latter question were involved in this case it would be a question for a court of equity. If the question were how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the part which he retains might not have been sold, unless the other part had been taken at the same time; and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case, however, no such question arises; for it appears to me that although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300, and the other for £700." And see to the same point, Mayfield *v.* Wadsley, 3 B. & C. 357. — The statement in the text, that, where the subject of the contract consists of several distinct and independent items, and no express agreement is made as to the consideration to be paid, the contract may be considered as severable, is well illustrated by the case of Robinson *v.* Green, 3 Metc. 159. That was an action of assumpsit to recover compensation for services rendered by the plaintiff to the defendant as an auctioneer, in selling seventy-six lots of wood. The plaintiff was a licensed auctioneer for the county of Middlesex. Two of the lots of wood sold were in the county of Middlesex, and the rest were in the county of Suffolk. The defendant contended that the claim of the plaintiff was entire; that part of it was a claim for services which were illegal, in selling property out of his county; and that the contract being entire, and the consideration, as to part at least, illegal, the action could not be maintained. *Sed non allocatur*, for, per *Shaw*, C. J.: — "The plaintiff does not claim on an entire contract. The sale of each lot is a distinct contract. The plaintiff's claim for a compensation arises upon each several sale, and is complete on such sale. If there were an express promise to pay him a fixed sum, as a compensation for the entire sale, it would have presented a different question. Where an entire promise is made on one entire consideration, and part of that consideration is illegal, it may avoid the entire contract. But here is no evidence of a promise of one entire sum for the whole service. It is the ordinary case of an auctioneer's commission, which accrues upon each entire and complete sale. We do not see how the question can be answered, which was put in the argument, namely, supposing the plaintiff had stopped after selling the two lots lying in South Reading, which it was lawful for him to sell, would he not have been entitled to his commission? If he would, we do not perceive how his claim can be avoided, by showing that he did something else on the same day, which was not *malum in se*, but an act prohibited by law, on considerations of public policy. The court are of opinion that the plaintiff's claim for a *quantum meruit* may be apportioned, and that he is entitled to recover for his services in the sale of the two lots." And see Mayor *v.* Pyne, 3 Bing. 285; Perkins *v.* Hart, 11 Wheat. 237, 251; Withers *v.* Reynolds, 2 B. & Ad. 882; Sickels *v.* Pattison, 14 Wend. 257; McKnight *v.* Dunlop, 4 Barb. 36, 47. — For the law applicable to cases where property is purchased in lots at auction at separate biddings, see *ante*, vol. 1, p. 417.

(*x*) Thus, if a ship be built upon a special contract, and it is part of the terms of that contract that given por-

the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound, or yard, or bushel, of the quantity contracted for, will not be sufficient to render the contract severable. (*y*) And if the consideration to be paid is single and entire, the contract

tions of the price shall be paid according to the progress of the work, to wit, part when the keel is laid; part when at the light plank; and the remainder when the ship is launched, there arises a separate contract for each instalment; and therefore when the keel is laid, or any other part of the ship for which an instalment is to be paid is completed, an action lies immediately for the one party to recover the instalment, and the part of the ship so completed becomes the property of the other party. Woods *v.* Russell, 5 B. & Ald. 942. See also Clarke *v.* Spence, 4 B & Ad. 448; Laidler *v.* Burlinson, 2 M. & W. 602; Cunningham *v.* Morrell, 10 Johns. 203.

(*y*) Clark *v.* Baker, 5 Metc. 452. The plaintiff in this case purchased of the defendant a cargo of corn on board a schooner lying in Boston, agreeing to pay 76½ cents per bushel for the yellow corn, and 73½ cents for the white corn; the defendant warranting it to to be of a certain quality. The quantity of corn was not known at the time of the purchase, but it afterwards appeared that there were between 2,000 and 3,000 bushels. The plaintiff paid the defendant $1,200 in advance, and after having received enough of the corn to amount, at the agreed price, to $1,067.02, refused to receive any more, on the ground that the remainder was not such as the cargo was warranted to be. This action was brought to recover the difference between the aforesaid sums of $1,200 and $1.067.02. The defendant objected that the contract was entire, and that the present action could not be maintained, without proof that the plaintiff offered to return the corn which he had accepted; and this objection was sustained. *Hubbard*, J., said: — "The question in the present case resolves itself into this: Was there one bargain for the whole cargo, or were there two distinct contracts for the yellow and white corn, or was there a separate and independent bargain for each bushel of corn contracted for, in consequence of which the receipt of one or more bushels of the warranted quality imposed no duty upon the plaintiff to retain the residue? And we are of opinion that the contract was an entire one. The bargain was not for 2,000 or 3,000 bushels of corn, but it was for the cargo of the schooner Shylock, be the quantity more or less; a cargo known to consist of two different kinds of corn; and the means taken to ascertain the amount to be paid were in the usual mode, by agreeing on the rate per bushel for the two kinds, and take the whole. . . . There is no ground, on the evidence as reported, to maintain that there were two contracts for the distinct kinds of corn; for it does not appear but that the 1,400 bushels that were retained consisted of a part of each. So that the plaintiff, to support his position, must contend, as he has contended, that the bargains in this case were separate bargains for each several bushel of a given quality, and for a distinct price. But this separation into parts so minute, of a contract of this nature, can never be admitted; for it might lead to the multiplication of suits indefinitely, in giving a distinct right of action for every distinct portion. As well might a man who sold a chest of tea by the pound, or a piece of cloth by the yard, or a piece of land by the foot or by the acre, contend that each pound, yard, foot, or acre, was the subject of a distinct contract, and each the subject of a separate action." So in Davis *v.* Maxwell, 12 Metc. 286, where the plaintiff agreed with the defendant to work on the farm of the latter for the period of "seven months, at twelve dollars per month," it was *held* that the contract was entire; that eighty-four dollars were to be paid at the end of seven months, and not twelve dollars at the end of each month; and that the plaintiff, on leaving the defendant's service without good cause before the seven months expired, was not entitled to recover any thing of the defendant.

must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. (z)

SECTION V.

APPORTIONMENT OF CONTRACTS.

A contract is said to be apportionable when the amount of consideration to be paid by the one party depends upon the extent of performance by the other. The question of apportionment must be carefully distinguished from that of entirety, considered in the last section. The latter must always be determined before the former can properly arise. For the question of apportionment always addresses itself to a contract which has already been ascertained to be single and entire.

When parties enter into a contract by which the amount to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, such a contract

(z) Miner *v.* Bradley, 22 Pick. 457. In this case the defendant put up at auction a certain cow and 400 pounds of hay, both of which the plaintiff bid off for $17, which he paid at the time. He then received the cow, and afterwards demanded the hay, which was refused by the defendant, who had used it. This action was brought to recover back the value of the hay. The defendant objected that the contract was entire; that the plaintiff could not recover back the price paid, or any portion of it, without rescinding the whole contract, and that this could not be done without returning the cow. And this objection was sustained by the court. *Morton*, J., said: — "There may be cases, where a legal contract of sale covering several articles may be severed, so that the purchaser may hold some of the articles purchased, and, not receiving others, may recover back the price paid for them. Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule; because in effect there is a separate contract for each separate article. This subject is well explained, and the law well stated, in Johnson *v.* Johnson, 3 B. & P. 162." The learned judge then stated that case, and continued: — "Had the plaintiff bid off the cow at one price, and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case. But such was not the fact. And it seems to us very clear that the contract was entire; that it was incapable of severance, that it could not be enforced in part and rescinded in part; and that it could not be rescinded without placing the parties in *statu quo*." See further on the subject of entirety, Jones *v.* Dunn, 3 W. & S. 109.

cannot be apportioned. Thus, if A. and B. agree together that A. shall enter into the service of B., and continue for one year, and that B. shall pay him therefor the sum of one hundred dollars; and A. enters the service accordingly, and continues half of the year, and then leaves, he will not be entitled to recover any thing *on the contract.* (*a*) This is an old and deep-rooted principle of the common law, and though it sometimes has the appearance of harshness, it would be difficult to contend against it upon principle. We have frequently had occasion to state that courts of justice can only carry into effect such contracts as parties have made. They cannot make contracts for them, or alter or vary those made by them. And it would seem difficult for a court, without travelling out of its true sphere, to say that because B. has agreed to pay one hundred dollars for one year's service, he has therefore agreed to pay at that rate, or any particular sum, for a shorter period. In other words, it cannot reasonably be presumed that the parties intended that the amount of consideration to be paid by B. should depend upon the amount of service rendered by A., when both of these were definitely fixed by the parties. The only agreement entered into by B. was to pay A. the sum of one hundred dollars, when the latter should have served him one year. Therefore, until the full year's service has been rendered, the *casus fœderis* does not arise.

It is to be borne in mind, however, that this is only a rule of construction, founded upon the intention of the parties, and not a rule of law which controls intention. Therefore, if the parties wish to make a contract which shall be apportionable, there is nothing to hinder their doing so, provided they make their intention sufficiently manifest. Thus, if A. and B. make a contract, by virtue of which A. is to enter into the service of B., at the rate of ten dollars per month, and continue so long as it shall be agreeable to both parties, such contract is clearly apportionable; for neither the extent of service nor the amount of consideration is fixed by the

(*a*) *Ex parte* Smyth, 1 Swanst. 337, and n. (*a*). We have already considered this point in our first volume, B. 3, ch. 9, sec. 1.

contract, but only a certain relation and proportion between them. And contracts have been held apportionable in which the service to be performed was specified and fixed, but the consideration to be paid was left to be implied by law. But this cannot be laid down as a general rule. (*b*)

We have seen that when parties make a contract which is not apportionable, no part of the consideration can be re-

(*b*) Roberts *v.* Havelock, 3 B. & Ad. 404. In this case a ship belonging to the defendant having come into port in a damaged state, the plaintiff was employed and undertook to put her into *thorough* repair. Before the work was completed, a dispute arose between the parties, and the plaintiff refused to proceed until he was paid for the work already done, and for which this action was brought. The defendant objected, that the action did not lie, inasmuch as the plaintiff had not completed his contract, and as long as that was the case, the work already done was unavailable for the purpose for which it had been required. And the case of Sinclair *v.* Bowles, 9 B. & Cr. 92, in which A., having undertaken for a specific sum of money to repair and make perfect a given article, and having repaired it in part, but not made it perfect, it was *held* that he was not entitled to recover for what he had done, was cited as in point. But Lord *Tenterden* said: — "I have no doubt that the plaintiff in this case was entitled to recover. In Sinclair *v.* Bowles the contract was *to do a specific work for a specific sum.* There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they are completed. The plaintiff was entitled to say that he would proceed no further with the repairs till he was paid what was already due." Mr. Smith, in his learned note to Cutter *v.* Powell, 1 Smith's Lead. Cas. 13, having stated this case, and quoted the language of Lord *Tenterden*, says: — "From these words it may be thought that his lordship's judgment proceeded on the ground that the performance of *the whole work* is not to be considered a condition precedent to the payment of *any part of the price*, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such a condition); and certainly good reasons may be alleged in favor of such a doctrine, for when the price to be paid is a specific sum, as in Sinclair *v.* Bowles, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of in a round sum as provided by the agreement; but, where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the parties intended the payment to keep pace with the accrual of the benefit for which payment is to be made. But this, of course, can only be when the consideration is itself of an apportionable nature, for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a nature, that it would be absurd to say that one part should be paid for before the remainder; as where a painter agrees to draw A.'s likeness, it would be absurd to require A. to pay a ratable sum on account when half the face only had been finished; it is obvious that he has then received no benefit, and never will receive any, unless the likeness should be perfected. There are, however, cases, that for instance of Roberts *v.* Havelock, in which the consideration is in its nature apportionable, and there, if no entire sum have been agreed on as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was that the remuneration should keep pace with the consideration, and be recoverable *toties quoties* by action on a *quantum meruit.*" See also Withers *v.* Reynolds, 2 B. & Ad. 882; Sickels *v.* Pattison, 14 Wend. 257.

covered in an action on the contract, until the whole of that for which the consideration was to be paid is performed. But it must not be inferred from this that a party who has performed a part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a *quantum meruit.*

Thus, if one party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus in fault cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract. The law, therefore, will imply a promise on his part to remunerate the other party for what he has done at his request; and upon this promise an action may be brought. (*c*)

So too if one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying any thing. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth, and to recover that *quantum* of remuneration an action of indebitatus assumpsit is maintainable. (*d*)

(*c*) Planchè *v.* Colburn, 8 Bing. 14; Goodman *v.* Pocock, 15 Q. B. 576; Hall *v.* Rupley, 10 Barr, 231; Moulton *v.* Trask, 9 Metc. 577; Hoagland *v.* Moore, 2 Blackf. 167; Bannister *v.* Read, 1 Gilm. 92; Selby *v.* Hutchinson, 4 Id. 319; Webster *v.* Enfield, 5 Id. 298; Derby *v.* Johnson, 21 Verm. 17. So too if a special action on the case is brought against the party in fault to recover damages for not being permitted to perform the contract, a reasonable compensation for what has been performed may be included in the damages. Goodman *v.* Pocock, 15 Q. B. 576; Derby *v.* Johnson, 21 Verm. 18; Clark *v.* Marsiglia, 1 Denio, 317.

(*d*) The cases bearing upon this last proposition are, it must be confessed, very conflicting. They may be conveniently arranged in three classes; — those arising on contracts of sale; those arising on contracts to do some specific labor upon the land of another, as to erect buildings, or build roads and bridges; and those arising upon ordinary contracts for service. The leading case of the first class is that of Oxendale *v.* Wetherell, 9 B. & Cr. 386. That was an action of indebitatus assumpsit to recover the price of 130 bushels of wheat sold and delivered by the plaintiff to the defendant, at 8*s.* per bushel. The defendant gave evidence to show that he made an absolute contract for 250 bushels, and contended that as the plaintiff had not fully performed his contract he was not entitled to recover any thing. But *Bayley*, J., before whom the cause was tried, was of opinion that,

SECTION VI.

OF CONDITIONAL CONTRACTS.

It is sometimes of great importance to determine whether there be a condition in a contract or an instrument. If, for

as the defendant had not returned the 130 bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels which had been delivered to and accepted by the defendant. A verdict was accordingly found for the plaintiff, with liberty to the defendant to move to enter a nonsuit. But upon a motion to that effect being made, Lord *Tenterden* said: — "If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole." *Bayley*, J. "The defendant having retained the 130 bushels, after the time for completing the contract had expired, was bound by law to pay for the same." *Parke*, J. "Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered, after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." So also in Read *v.* Rann, 10 B. & Cr. 439, *Parke*, J., said: "In some cases, a special contract not executed may give rise to a claim in the nature of a *quantum meruit*, *ex. gr.*, where a special contract has been made for goods, and goods sent not according to the contract are retained by the party, there a claim for the value on a *quantum valebant* may be supported. But then from the circumstances a new contract may be implied." And see, to the same effect, Shipton *v.* Casson, 5 B. & Cr. 378. So too in Massachusetts it has been *held*, that if the vendee of a specific quantity of goods sold under an entire contract, receives a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part. Bowker *v.* Hoyt, 18 Pick. 555. And we apprehend that a similar rule would be adopted by a majority of the courts in this country. But in New York the case of Oxendale *v.* Wetherell has been entirely repudiated, and it is there *held* that the vendor in such a case is not entitled to any remedy. Champlin *v.* Rowley, 13 Wend. 258, 18 Id. 187; Mead *v.* Degolyer, 16 Wend. 632; McKnight *v.* Dunlop, 4 Barb. 36; Paige *v.* Ott, 5 Denio, 406. And so also in Ohio. Witherow *v.* Witherow, 16 Ohio, 238, *Read*, J., *dissenting*. — One of the most important cases in the second class is Hayward *v.* Leonard, 7 Pick. 181. In that case the plaintiff contracted in writing to build a house for the defendant, at a certain time, and in a certain manner, on defendant's land, and afterwards built the house within the time, and of the dimensions agreed on, but in workmanship and materials varying from the contract. The defendant was present almost every day during the building, and had an opportunity of seeing all the materials and labor, and objected at times to parts of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with a part of the work from time to time, though professing to be no judge of it. Soon after the house was done he refused to accept it, but the plaintiff

instance, a deed contain a grant on condition, then if there be a breach of condition, the grant is void, and the estate

had no knowledge that he intended to refuse it till after it was finished. It was *held* that the plaintiff might maintain an action against the defendant on a *quantum meruit* for his labor, and on a *quantum valebant* for the materials. It may be gathered, however, from the judgment of *Parker*, C. J., that he considered that one of two things must be proved in order to entitle the plaintiff to recover; — either that there was an honest intention to go by the contract, and a substantive execution of it, with only some comparatively slight deviations as to some particulars provided for; or that there was an assent or acceptance, express or implied, by the party with whom the plaintiff contracted. That such is now the received law, see Smith *v.* Lowell, 8 Pick. 178; Taft *v.* Montague, 14 Mass. 282; Olmstead *v.* Beale, 19 Pick. 528; Snow *v.* Ware, 13 Mete. 42; Hayden *v.* Madison, 7 Greenl. 76; Jennings *v.* Camp, 13 Johns. 94; Kettle *v.* Harvey, 21 Verm. 301; Burn *v.* Miller, 4 Taunt. 745; Chapel *v.* Hickes, 2 Cr. & M. 214; Thornton *v.* Place, 1 M. & Rob. 218. But see Ellis *v.* Hamlen, 3 Taunt. 52; Sinclair *v.* Bowles, 9 B. & Cr. 92; Wooten *v.* Read, 2 S. & M. 585; Helm *v.* Wilson, 4 Mis. 41. — We are not aware that there are any cases upon contracts for service fully sustaining the proposition in the text, except the celebrated one of Britton *v.* Turner, 6 N. H. 481, already cited by us, vol. 1, p. 524, note (*p*). That was an action of indebitatus assumpsit for work and labor performed by the plaintiff for the defendant, from March 9, 1831, to December 27, of the same year. The defendant offered evidence to prove that the work was done under a contract to work for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent, and without good cause. The learned judge instructed the jury, that although all these points should be made out, yet the plaintiff was entitled to recover, under his *quantum meruit* count as much as the labor performed was reasonably worth. And this instruction was held to be correct. *Parker*, C. J., in delivering the judgment of the court, after noticing several of the cases cited above in the second class, said: — "Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance, that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it — elect to take no benefit from what has been performed — and therefore if he does receive he shall be bound to pay the value; whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract, under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment. But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other party may eventually fail of completing the entire term. If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. . . . If the party who has contracted to receive merchandise takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor in part, under similar circumstances, should pay the value of what has been done for his benefit. It

may never vest, or may be forfeited. A condition of this sort is not favored, and would not be readily implied. (*e*) But stipulations or agreements may be implied, upon the breach of which an action may be brought. Mutual con-

is said, that in those cases where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance. If, then, the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished. We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. . . . We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to 'recover on his new case for the work done, not as agreed, but yet accepted by the defendant.' 1 Dane's Abr. 224." But the courts of other States have thus far shown little disposition to adopt the views of the learned judge. Thus, in Eldridge *v.* Rowe, 2 Gilm. 91, the court *held* upon a similar state of facts that the plaintiff was not entitled to recover. And *Young*, J., said : — "It is no objection to say that the defendant has received the benefit of his labor, this being a case, where, from its nature, the defendant could not separate the products of his labor from the general concerns of his farm, and ought not, therefore, to be responsible to any extent whatever for not doing that which was impossible." See also Miller *v.* Goddard, 34 Maine, 102; Olmstead *v.* Beale, 19 Pick. 529; Davis *v.* Maxwell, 12 Mete. 286. So also *ante*, vol. 1, p. 522, n. (*l*), and p. 526, n. (*q*). — Difficult questions frequently arise in the classes of cases considered in the present note, as to the measure of damages, and the right of the defendant to have deducted from the amount otherwise recoverable the damage sustained by him in consequence of the breach of the contract. These questions will be considered under their appropriate heads in the subsequent parts of the present volume.

(*e*) See *ante*, p. 21, n. (*c*).

tracts sometimes contain a condition, the breach of which by one party permits the other to throw the contract up, and consider it as altogether null. Whether a provision shall have this effect, for which purpose it must be construed as an absolute condition, is sometimes a question of extreme difficulty. It is quite certain, however, that now no precise words are requisite to constitute a condition. It would be difficult, and perhaps impossible, to lay down rules which would have decisive influence in determining this vexed question. Indeed, courts seem to agree of late that the decision must always "depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates." (*f*) "It cannot depend on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract." (*g*) It is said that where the clause in question goes to the whole of the consideration, it shall be read as a condition. (*h*) The meaning of this must be, that if the supposed condition covers the whole ground of the contract, and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party the right of avoiding or rescinding it altogether. But where the supposed condition is distinctly separable, so that much of the contract may be performed on both sides as though the condition were not there; it will be read as a stipulation, the breach of which gives an action only to the injured party. But it is not safe to assert that which is sometimes said to be law, (*i*) that where in case of a breach the party cannot have his action for damages, there the doubtful clause must be read as a condition, because otherwise the party injured would be without remedy. For if "the reason and sense of the thing," or the rational and fair construction of the contract leads to the conclusion that the parties did not agree, nor intend that there should be this

(*f*) Per *Tindal*, C. J., in Glaholm *v.* Hays, 2 M. & Gr. 266.

(*g*) Per Lord *Ellenborough*, in Ritchie *v.* Atkinson, 10 East, 295.

(*h*) Boone *v.* Eyre, 1 H. Bl. 273, n. (*a*).

(*i*) See Pordage *v.* Cole, 1 Saund. 319.

condition, then there is none; and if a party be in this way injured and remediless, it is his own fault, in that he neither inserted in his contract a condition, the breach of which would discharge him from all obligation, nor a stipulation, for the breach of which he might have his action. (*j*)

SECTION VII.

OF MUTUAL CONTRACTS.

It is a similar question — sometimes indeed the very same question — whether covenants are mutual, in such sense that each is as a condition precedent to the other. And also whether covenants or agreements be dependent or independent. (*k*) By the very definition of them, if they are dependent, that is, if each depends on the other, the failure of one destroys and annuls the other. Or if this dependence is not mutual, but one of them rests upon the other by a dependence which is not equally shared by the other, if that contract upon which this dependence rests is broken and defeated, the other by reason of its dependence is annulled and destroyed also. But they may be wholly independent, although relating to the same subject, and made by the same parties, and included in the same instrument. In that case they are two separate contracts. Each party must perform what he undertakes, without reference to the discharge of his obligation by the other party. And each party may have his action

(*j*) See *infra*, n. (*l*).

(*k*) In Kingston *v.* Preston, cited in Jones *v.* Barclay, Doug. 690, Lord *Mansfield* said: — "There are three kinds of covenants: 1. Such as are called *mutual and independent*, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are *conditions and dependent*, in which the performance of one depends upon the prior performance of another, and therefore, until this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are *mutual conditions* to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." See also Mason *v.* Chambers, 4 Littell, 253; and Mr. Durnford's note to Ackerley *v.* Vernon, Willes, 157.

against the other for the non-performance of his agreement, whether he has performed his own or not. Now the law has no preference for one kind of contract over another; nor does it by its own implication and intendment make one rather than the other, and still less does it require one rather than the other. It may indeed be safely said, that this question in each particular case will be determined by inferring with as much certainty as the case permits, the meaning and purpose of the parties, from a rational interpretation of the whole contract. (*l*)

(*l*) In ancient times the decision of questions of this kind depended rather upon nice and subtle constructions put upon the language of a contract, than upon the evident sense and intention of the parties, as gathered from a rational consideration of the whole instrument, and the subject-matter of the agreement. Thus, in 15 H. 7, 10, pl. 17, it was ruled by *Fineux*, C. J., that if one covenant with me to serve me for a year, and I covenant with him to give him £20, if I do not say *for the cause aforesaid*, he shall have an action for the £20, although he never serves me; otherwise it is if I say that he shall have £20 *for the cause aforesaid*. So if I covenant with a man that I will marry his daughter, and he covenants with me that he will make an estate to me and his daughter, and the heirs of our two bodies begotten, if I afterwards marry another woman, or his daughter marries another man, yet I shall have an action of covenant against him to compel him to make the estate; but if the covenant were that he would make the estate to us two *for the cause aforesaid*, in that case he would not make the estate until we were married. And such was the opinion of the whole court. But Lord *Holt*, in the great case of Thorp *v.* Thorp, 12 Mod. 455, and Lord Chief Justice *Willes*, in Acherley *v.* Vernon, Willes, 153, advanced more rational ideas upon the subject. And in Kingston *v.* Preston, already cited, Lord *Mansfield* declared that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. Since that time the principle thus enunciated by Lord *Mansfield* has been steadily adhered to; and, as a means of carrying it out, and applying it to the facts of particular cases, Mr. Sergeant *Williams*, in his elaborate note to Pordage *v.* Cole, 1 Wms. Saund. 319, has given the five following rules, collected with great care and accuracy from the decided cases. 1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act is to be performed; an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." See Pordage *v.* Cole, 1 Saund. 319 b; Thorp *v.* Thorp, 12 Mod. 460, 1 Salk. 171, per *Holt*, C. J.; Peeters *v.* Opie, 2 Saund. 350, per *Hale*, C. J.; Campbell *v.* Jones, 6 T. R. 570; Mattock *v.* Kinglake, 10 A. & El. 50; Wilks *v.* Smith, 10 M. & W. 355; Edgar *v.* Boies, 11 S. & Raw. 445; Stevenson *v.* Kleppinger, 5 Watts, 420; Lowry *v.* Mehaffy, 10 Watts, 387; Goldsborough *v.* Orr, 8 Wheat. 217; Robb *v.* Montgomery, 20 Johns. 15. The principle of this rule has been misapplied in various cases, as in Terry *v.* Duntze, 2 H. Bl. 389. In that case A. covenanted to build a house for B., and finish it on or before a certain day, in consideration of a sum of money, which B. covenanted to pay A. by instalments

SECTION VIII.

OF THE PRESUMPTIONS OF LAW.

There are some general presumptions of law, which may be considered as affecting the construction of contracts.

as the building proceeded. It was *held* that the finishing of the house was not a condition precedent to the payment of the money; that A. might maintain an action of debt against B. for the whole sum, though the building was not finished at the time appointed, on the ground that part of the money was to be paid before the house could be completed. This case was followed in Seers *v.* Fowler, 2 Johns. 272, and Havens *v.* Bush, Id. 387. But in Cunningham *v.* Morrell, 10 Johns. 203, Seers *v.* Fowler and Havens *v.* Bush were overruled, and the authority of Terry *v.* Duntze repudiated. Cunningham *v.* Morrell was followed in McLure *v.* Rush, 9 Dana, 64, and in Allen *v.* Sanders, 7 B. Monr. 593, overruling the earlier cases of Craddock *v.* Aldridge, 2 Bibb, 15, and Mason *v.* Chambers, 4 Littell, 253. And see to the same effect Kettle *v.* Harvey, 21 Verm. 301; Lord *v.* Belknap, 1 Cush. 279; Tompkins *v.* Elliot, 5 Wend. 496. — In the case of contracts for the purchase and sale of real estate, where the purchaser covenants to pay the purchase-money by instalments, and the vendor covenants to convey by deed, either on the last day of payment, or on some day previous, the covenants to pay the instalments falling due before the day appointed for conveying by deed, are independent of the covenant to convey, and an action may be maintained for such instalments, without showing any conveyance or offer to convey; but the conveyance, or offer to convey, is a condition precedent to the right to insist upon the payment of an instalment falling due either on or after the day of conveyance. Grant *v.* Johnson, 1 Selden, 247, reversing the judgment of the Supreme Court in the same case in 6 Barb. 337. In this case the plaintiff agreed to sell to the defendant a piece of land, and covenanted to give possession of the land on the first of November, 1845, and to convey by deed on the first of May, 1846. And the defendant covenanted to pay $950, as follows, to wit: $200 on the first of April, 1846, $200 on the first of April, 1847, $275 on the first of April, 1848, and $275 on the first of April, 1849. The plaintiff gave the defendant possession of the premises, and the defendant paid the first instalment according to the terms of the agreement. The present action was brought to recover the second instalment; and the court *held*, that the conveyance by deed was a condition precedent to the payment of any instalment after the first; and therefore the plaintiff was not entitled to recover without averring a performance or tender of performance of such condition. So in Bean *v.* Atwater, 4 Conn. 3, A. and B. on the 6th of August, 1816, entered into articles of agreement, whereby A., in consideration of the covenants to be performed and payments to be made by B., granted and sold to B. certain tracts of land, and covenanted to confirm them to him by deed in fee simple, on the first of June, 1817; and A. covenanted to pay therefor the sum of 4,000 dollars, of which 500 dollars were to be paid immediately, 500 dollars on the first of January, 1817, 500 dollars on the first of June, 1817, 500 dollars on the first of January, 1818, 1,000 dollars on the first of January, 1819, and the residue on the first of January, 1820. For the performance of these stipulations the parties bound themselves, respectively, in the penalty of 8,000 dollars. In an action brought by A. against B. for the money, it was *held*, that the covenant of the defendant, so far as it related to the two first instalments, was independent, and the plaintiff was entitled to recover the sum due thereon, without averring or proving performance of the covenant on his part; but that, so far as it related to the instalment payable on the first of June, 1817, and the subsequent instalments, performance by the plaintiff was a con-

Thus, it is a presumption of law that parties to a simple contract intended to bind not only themselves, but their per-

dition precedent to his right of recovery. And see to the same effect Leonard *v.* Bates, 1 Blackf. 172; Kane *v.* Hood, 13 Pick. 281. But see Weaver *v.* Childress, 3 Stewart, 361. — 2. "When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." Thorp *v.* Thorp, 12 Mod. 460, 1 Salk. 171; Bean *v.* Atwater, 4 Conn. 9; Dey *v.* Dox, 9 Wend. 129; Morris *v.* Sliter, 1 Denio, 59. — 3. "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant and an action may be maintained for a breach of the covenant on the the part of the defendant, without averring performance in the declaration." The leading case upon this point is Boone *v.* Eyre, 1 H. Bl. 273, note (*a*). The plaintiff, in that case, conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500, and an annuity of £160 per annum for life; and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted *that the plaintiff well and truly performing all and every thing on his part to be performed*, he the defendant would pay the annuity. The action was brought for the non-payment of the annuity. Plea, that the plaintiff was not at the time of making the deed legally possessed of the negroes, and so had not a good title to convey. General demurrer to the plea. Lord *Mansfield*: — "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea be allowed, any one negro not being the property of the plaintiff, would bar the action." Upon this case Sergeant *Williams* remarks as follows: — "The *whole* consideration of the covenant on the part of B. the purchaser to pay the money, was the conveyance by A. the seller to him of the *equity of redemption* of the plantation, and also the stock of negroes upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to *part* of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment, because A. had not a good title to the negroes. Per *Ashhurst*, J., 6 T. R. 573. Besides, the damages sustained by the parties would be unequal, if A.'s covenant were held to be a condition precedent. Duke of St. Albans *v.* Shore, 1 H. Bl. 279. For A. on the one side would lose the consideration money of the sale, but B.'s damage on the other might consist perhaps in the loss only of a few negroes. So where it was agreed between C. and D., that in consideration of £500, C. should teach D. the art of bleaching materials for making paper, *and* permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification; and C. in consideration of the sum of £250 paid, and of the further sum of £250 to be paid by D. to him, covenanted that he would with all possible expedition teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of £250. In covenant by C. against D., the breach assigned was the non-payment of the £200. Demurrer, that it was not averred that C. had taught D. the method of bleaching such materials; but it was *held* by the court, that the *whole* consideration of the agreement being that C. should *permit* D. to *bleach materials*, as well as *teach* him the method of doing it; the covenant by C. to teach formed but *part* of the consideration, for a breach of which D. might recover a recompense in damages. And

sonal representatives; and such parties may sue on a con-

C. having in part executed his agreement, by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration because he may have sustained some damage by D.'s not having instructed him; and the demurrer was overruled. Campbell *v.* Jones, 6 T. R. 570. Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. And hence too, it seems, it must appear upon the record that the consideration was *executed in part*, as in Boone *v.* Eyre, above mentioned, the action was on a *deed*, whereby the plaintiff had conveyed to the defendant the equity of redemption of the plantation, for the defendant did not deny the plaintiff's title to convey it; so in Campbell *v.* Jones, the plaintiff had transferred to the defendant a right to exercise the patent. Therefore if an action be brought on a covenant or agreement contained in articles of agreement, or other executory contract where the whole is future, it seems necessary to aver performance in the declaration of the whole, or at least of part of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed it. As where A., by articles of agreement, in consideration of a sum of money to be paid to him by B. on a certain day, covenants to convey to B. on the same day a house, together with the fixtures and furniture therein, and that he was lawfully seised of the house, and possessed of the fixtures and furniture. In an action against B. for the money, A. must aver that he conveyed either the whole of the premises, or at least the house, to B., or it must be admitted by B. in his plea that A. did convey the house, but was not lawfully possessed of the furniture or fixtures." For further illustration of this principle, see Fothergill *v.* Walton, 2 J. B. Moore, 630; Stavers *v.* Curling, 3 Bing. N. C. 355; Franklin *v.* Miller, 4 Ad. & El. 599; Fishmongers' Co. *v.* Robertson, 5 M. & Gr. 131, 198; Storer *v.* Gordon, 3 M. & S. 308; Ritchie *v.* Atkinson, 10 East, 308; Havelock *v.* Geddes, Id. 555; Mill Dam Foundery *v.* Hovey, 21 Pick. 417; Tileston *v.* Newell, 13 Mass. 406; Bennet *v.* Pixley, 7 Johns. 249; Obermyer *v.* Nichols, 6 Binn. 159; Morrison *v.* Galloway, 2 H. & Johns. 461; Todd *v.* Summers, 2 Gratt. 167; Lewis *v.* Weldon, 3 Rand. 71; McCullough *v.* Cox, 6 Barb. 386; Payne *v.* Bettisworth, 2 A. K. Marsh. 427; Keenan *v.* Brown, 21 Verm. 86; Tompkins *v.* Elliot, 5 Wend. 496; Grant *v.* Johnson, 5 Barb. 161, 6 Id. 337, 1 Selden, 247. "If," says *Shaw*, C. J., in Knight *v.* The New England Worsted Co. 2 Cush. 286, "a party promise to build a house upon the land of another, and to dig a well on the premises, and to place a pump in it; and the owner of the land covenants seasonably to supply all materials and furnish a pump; it is very clear that the stipulation to furnish materials is dependent, and constitutes a condition, because the builder cannot perform on his part until he has the materials. So to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance, on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by action on the contract." — 4. "But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance must be averred." Duke of St. Albans *v.* Shore, 1 H. Bl. 270; Dakin *v.* Williams, 11 Wend. 67. — 5. "Where two acts are to be done *at the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money *on the same day*, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of

tract, although not named therein. (*m*) Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract; as where the thing to be done required the personal skill of the testator himself. (*n*) So too, if several persons stipulate for the performance of any act, without words of severalty, the presumption of law is here that they intended to bind themselves jointly. (*o*) But this presumption also might be rebutted by the nature of the work to be done, if it were certain that separate things were to be done by separate parties, who could not join in the work. (*p*)

It is also a legal presumption that every grant carries with it whatever is essential to the use and enjoyment of the

sale." See the numerous cases cited by Serjeant *Williams*. And also Campbell *v.* Gittings, 19 Ohio, 347; Williams *v.* Healey, 3 Denio, 363; Gazley *v.* Price, 16 Johns. 267. — Where a party agreed *on the payment* by another of certain sums of money to a *third person*, to assign certain certificates of sale of land, it was *held* that the covenants were independent, and that in a suit by the party bound to assign, a general averment of readiness on his part to perform was sufficient. Slocum *v.* Despard, 8 Wend. 615. See Northrup *v.* Northrup, 6 Cow. 296; Champion *v.* White, 5 Cow. 509; Robb *v.* Montgomery, 20 Johns. 15. But see Parker *v.* Parmele, 20 Johns. 130; Adams *v.* Williams, 2 W. & Serg. 227; Halloway *v.* Davis, Wright, 129. Justice would seem to require that such stipulations should be considered as dependent. Leonard *v.* Bates, 1 Blackf. 172, note; per *Shaw*, C. J., in Kane *v.* Hood, 13 Pick. 281. — 6. It may also be laid down as a rule, that stipulations or promises may be dependent from the nature of the acts to be performed, and the order in which they must necessarily precede and follow each other. "When the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent, without express words." Per *Shaw*, C. J., in Mill Dam Foundery *v.* Hovey, 21 Pick. 439; Thomas *v.* Cadwallader, Willes, 496; Knight *v.* New Eng. Worsted Co. 2 Cush. 286. In Coombe *v.* Greene, 11 M. & Wels. 480, the plaintiff demised a dwelling-house and premises to the defendant, and the defendant covenanted that he would expend £100 in improvements and additions to the dwelling-house, under the direction of some competent surveyor to be appointed by the plaintiff. *Held*, that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the £100. But see Macintosh *v.* The M. C. Railway Co. 14 M. & W. 548.

(*m*) Siboni *v.* Kirkman, 1 M. & W. 418, 423; Quick *v.* Ludborrow, 3 Bulst. 30; Marshall *v.* Broadhurst, 1 Cr. & Jer. 403.

(*n*) See *ante*, vol. 1, pp. 107, 111.

(*o*) See *ante*, vol. 1, p. 11, n. (*h*).

(*p*) See the case of Slater *v.* Magraw, 12 Gill & Johns. 265, cited *ante*, vol. 1, p. 11, n. (*h*). See also Erskine's Institute, B. 3, tit. 3, sec. 22.

grant. (*q*) But this rule applies perhaps more strongly to grants of real estate than to transfers of personal property. Thus, if land be granted to another, a right of way to the land will go with the grant. (*r*) But it has been held, where goods were sold on execution, and left on the land of the judgment debtor, that the purchaser acquired no absolute right to go on the land of the seller for the purpose of taking the goods. (*s*) But it has also been held that where goods of the plaintiff were sold on distress for rent, which were on plaintiff's land, and one of the conditions to which he was a party permitted defendant to enter from time to time and take the goods away, this was a license by the plaintiff, and was irrevocable, because coupled with an interest. (*t*) It may perhaps be inferred, from the cases and *dicta* on this subject, that as real rights go with a grant of real property where they are essential to its proper use, so such personal rights, or even personal chattels, would go with the transfer of personal property, as were absolutely necessary for the use and enjoyment of the things sold; for it might well be presumed to have been the intention and understanding of the parties that they should pass together. (*u*) And we

(*q*) Liford's case, 11 Rep. 52; Co. Lit. 56 a; Pomfret *v.* Ricroft, 1 Wms. Saund. 323, n. (6). Where an act of parliament empowered a railway company to cross the line of another company, by means of a bridge, it was *held* that the first-mentioned company had consequently the right of placing temporary scaffolding on the land belonging to the latter, if the so placing it were necessary for the purpose of constructing the bridge; for *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest.* Clarence Railway Co. *v.* Great North of England Railway Co. 13 M. & W. 706. See also Hinchliffe *v.* Earl of Kinnoul, 5 Bing. N. C. 1; Dand *v.* Kingscote, 6 M. & W. 174; Broom's Legal Maxims, 362, 2d. ed.

(*r*) Pomfret *v.* Ricroft, 1 Wms. Saund. 323, note (6); Howton *v.* Frearson, 8 T. R. 50; Collins *v.* Prentice, 15 Conn. 39. It must be strictly a way of necessity, and not of mere convenience. Nichols *v.* Luce, 24 Pick. 102; Allen *v.* Kincaid, 2 Fairf. 155; Stuyvesant *v.* Woodruff, 1 New Jer. 134; Trask *v.* Patterson, 29 Maine, 499. The right of way is suspended or destroyed whenever the necessity ceases. Pierce *v.* Selleck, 18 Conn. 321; Holmes *v.* Goring, 2 Bing. 76. Where a parcel of land is sold for a specific purpose, and conveyed without reservation, the law will not imply in favor of the vendor a right of way of necessity over or through such land, inconsistent with the object of the purchase. Seeley *v.* Bishop, 19 Conn. 128.

(*s*) Williams *v.* Morris, 8 M. & W. 488.

(*t*) Wood *v.* Manley, 11 Ad. & El. 34.

(*u*) If one grant trees growing in his wood, the grantee may enter and cut down the trees and carry them away. Reniger *v.* Fogossa, Plowd. 16; Liford's case, 11 Rep. 52; Shep. Touch. 89. By a grant of the fish in a pond, a right of coming upon the banks and fishing for them is granted. Reniger *v.* Fogossa, Plowd. 16; Shep. Touch. 89; Lord Darcy *v.* Askwith, Hob. 234. A rector may enter into a close to carry

should be even inclined to say, that if one sold goods on his land, especially under seal, and there was nothing in the contract or the circumstances to show that the buyer was to come into possession otherwise than by entering upon the land and taking them, it would be presumed that this was intended, and that the sale operated as a license to do this in a reasonable time and a reasonable way, which the seller could not revoke. (*v*)

Where any thing is to be done, as goods to be delivered, or the like, and no time is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time. (*w*) But what is a reasonable time is a question of law for the court. (*x*) They will consider all the facts and circumstances of the case in determining this, and if any facts bearing upon this point are in question, it will be the province of the jury to settle those facts, although the influence of the facts when determined, upon the question of reasonableness, remains to be determined by the court. In general, it may be said that questions of reasonableness, other than that of time, are questions of fact for the jury.

away the tithes over the usual way, as incident to his right to the tithes. Cobb *v.* Selby, 5 Bos. & Pul. 466.

(*v*) Perhaps, however, it would be found difficult to support this proposition in its full extent, unless the grant was made by deed. It would seem that such a license, in order to be irrevocable, must amount to a grant of an interest in land, which can only be by deed. "It certainly strikes one as a strong proposition to say that such a license can be irrevocable, unless it amount to an interest in land, which must therefore be conveyed by deed." Per *Parke*, B., in Williams *v.* Morris, 8 M. & W. 488. See also Gale and Whatley on Easements, p. 18, *et seq.*

(*w*) Crocker *v.* The Franklin H. & F. Man. Co. 3 Sumn. 530; Ellis *v.* Thompson, 3 M. & W. 445; Greaves *v.* Ashlin, 3 Campb. 426; Sawyer *v.* Hammatt, 15 Maine, 40; Howe *v.* Huntington, Id. 350; Atkinson *v.* Brown, 20 Maine, 67.

(*x*) Attwood *v.* Clark, 2 Greenl. 249; Kingsley *v.* Wallis, 14 Maine, 57; Murry *v.* Smith, 1 Hawkes, 41. For certain exceptions to this rule, see Howe *v.* Huntington, 15 Maine, 350. See also Hill *v.* Hobart, 16 Maine, 164.

SECTION IX.

OF THE EFFECT OF CUSTOM OR USAGE.

A custom, which may be regarded as appropriate to the contract and comprehended by it, has often very great influence in the construction of its language. (*y*) The general

(*y*) That evidence may be given of a custom or usage of trade to aid in the construction of a contract, either by fixing the meaning of words where doubtful, or by giving them a meaning wholly distinct from their ordinary and popular sense, is a well established doctrine. Thus, where it was represented to underwriters on a policy of insurance that the ship insured was to sail "in the month of October," evidence was admitted to show that the expression "in the month of October," was well understood amongst men used to commercial affairs to signify some time between the 25th of that month and the 1st or 2d of the succeeding month. Chaurand *v.* Angerstein, Peake's N. P. Cas. 43. So also, custom or usage may be admitted to show that "a whaling voyage" includes the taking of sea-elephants, on the beaches of islands and coasts, as well as whales. Child *v.* Sun Mutual Ins. Co. 3 Sandf. 26. So also as to the meaning of "cotton in bales." Taylor *v.* Briggs, 2 C. & P. 525. Evidence may also be admitted that the word "days" in a bill of lading means working days, and not running days. Cochran *v.* Retberg, 3 Esp. 121. Evidence may also be given of the mercantile meaning of the terms "good," and "fine," as applied to barley. Hutchison *v.* Bowker, 5 M. & W. 535; Whitmore *v.* Coats, 14 Mis. 9. So also as to the meaning of the word "privilege," in an agreement with the master of a ship. Birch *v.* Depeyster, 4 Camp. 385. In Evans *v.* Pratt, 3 M. & Gr. 759, evidence was admitted to show that "across a country," in a memorandum respecting a race, means that the riders are to go over all obstructions, and are not at liberty to use a gate. See Sleght *v.* Hartshorne, 2 Johns. 531, as to the meaning of "sea-letter." Astor *v.* Union Ins. Co. 7 Cow. 202, as to the meaning of "furs." See also Haynes *v.* Holliday, 7 Bing. 587; Read *v.* Granberry, 8 Ired. 109; Barton *v.* McKelway, 2 N. Jer. 174; Robertson *v.* Jackson, 2 C. B. 412; Vail *v.* Rice, 1 Seld. 155. So in the case of a contract to sell "mess pork of Scott & Co.," evidence was admitted to show that this language in the market meant pork *manufactured by* Scott & Co. Powell *v.* Horton, 2 Bing. N. C. 668. Where a contract was worded thus: "Sold 18 pockets Kent hops, at 100*s*.," it was permitted to be shown that by the usage of the hop trade, a contract so worded was understood to mean 100*s*. per cwt., and not per pocket. Spicer *v.* Cooper, 1 Q. B. 424. See also Bowman *v.* Horsey, 2 Mood. & Rob. 85. So evidence has been admitted to show that "rice" is not considered as *corn* within the memorandum of a policy of insurance. Scott *v.* Bourdillion, 5 Bos. & Pul. 213. See also Clayton *v.* Gregson, 5 Ad. & El. 302, as to the meaning of the word "level" among miners. And see Grant *v.* Maddox, 15 M. & W. 737. Owing to the loose and inaccurate manner in which policies of insurance are drawn, a class of cases has sprung up, almost peculiar to this instrument, in which evidence is admitted of usages between the underwriters and the assured, affixing to certain words and clauses a known and definite meaning. Thus, in Brough *v.* Whitmore, 4 T. R. 206, on evidence of the practice of merchants and underwriters, it was *held* that *provisions*, sent out in a ship for the use of the crew, were protected by a policy on the ship and *furniture*. Lord *Kenyon*, in giving judgment, said: — "I remember it was said many years ago, that if Lombard Street had not given a construction to policies of insurance, a de-

reason of this is obvious enough. If parties enter into a contract, by virtue whereof something is to be done by one or both, and this thing is often done in their neighborhood, or by persons of like occupation with themselves, and is always done in a certain way, it must be supposed that they intended it should be done in that way. The reason for this supposition is nearly the same as that for supposing that the common language which they use is to be taken in its common meaning. And the rule that the meaning and intent of the parties governs, wherever this is possible, comes in and operates. Hence an established custom may add to a contract stipulations not contained in it; on the ground that the parties may be supposed to have had these stipulations in their minds as a part of their agreement, when they put upon paper or expressed in words the other part of it. (z) So cus-

claration on a policy would have been had on general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible." In Coit *v.* Commercial Ins. Co. 7 Johns. 385, evidence was received of a usage among underwriters and merchants restricting the term "roots" in the memorandum of a policy to such articles as were in their nature perishable, and excluding sarsaparilla. See also Allegre's Adm'rs *v.* Maryland Ins. Co. 2 Gill & J. 136; Allegre *v.* Maryland Ins. Co. 6 Har. & J. 408; Macy *v.* Whaling Ins. Co. 9 Metc. 354; Eyre *v.* Marine Ins. Co. 5 W. & S. 116; 1 Duer on Ins. 185.

(z) "It has long been settled," says *Parke*, B., in Hutton *v.* Warren, 1 M. & W. 475, "that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." Thus, a usage among printers and booksellers, that a printer, contracting to print a certain number of copies of a work, is not at liberty to print from the same types while standing an *extra* number for his own disposal, is admissible. Williams *v.* Gilman, 3 Greenl. 276. So, where bought and sold notes were given on a sale of tobacco, in an action for the price of the tobabco, it was permitted to be shown, that by the established usage of the tobacco trade, all sales were by sample, though not so expressed in the bought and sold notes. Syers *v.* Jonas, 2 Exch. 111. See also Hodgson *v.* Davies, 2 Camp. 530; The Queen *v.* Inhabitants of Stoke-upon-Trent, 5 Q. B. 303; Conner *v.* Robinson, 2 Hill, [So. Car.] 354; Whittaker *v.* Mason, 2 Bing. N. C. 359. — Where goods are consigned to an agent for sale, with general instructions to *remit* the proceeds, it is a sufficient compliance with such instructions if the agent remit by bill of exchange, without indorsing or guaranteeing it, provided such is the usage at the agent's place of business. Potter *v.* Morland, 3 Cush. 384. See Putnam *v.* Tillotson, 13 Met. 517. But see Gross *v.* Criss, 3 Grat. 262. — The influence of *local customs* is particularly manifest in the cases that arise between landlord and tenant. "The common law does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of

tom may control and vary the meaning of words; (*a*) giving even to such words as those of number a sense entirely dif-

waste, that it is by no means surprising that the courts should have been favorably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties." Per *Parke*, B., in Hutton *v.* Warren, 1 M. & W. 476; Legh *v.* Hewitt, 4 East, 154. In Wigglesworth *v.* Dallison, Dougl. 201, the tenant was allowed an away-going crop, although there was a formal lease under seal. "The custom," says Lord *Mansfield*, "does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." So also a custom to remove fixtures may be incorporated into a lease. Van Ness *v.* Pacard, 2 Pet. 137. "Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies." Per *Story*, J., Id. 148. See also Senior *v.* Armitage, Holt, 197; Webb *v.* Plummer, 2 B. & Ald. 750; Holding *v.* Pigott, 7 Bing. 465; Roberts *v.* Barker, 1 Cr. & M. 808; Wilcox *v.* Wood, 9 Wend. 346. — The common carrier is bound to deliver goods according to the usage of the business in which he is engaged. Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 389. See also *ante*, vol. 1, p. 661, *et seq.* — Before an "incident" can be "annexed" to a contract, the contract itself, as made, must be proved. Doe *v.* Eason, 11 Ired. 568. — The cases we have been noticing are those in which the custom or usage of trade has been brought in to affect the *construction* of written instruments. There is another class of cases in which the usage is not brought in to vary the construction of the contract, but to "substitute in the particular instance a rule resulting from the usage, in place of that which the law, not the contract of the parties, would prescribe." 1 Duer on Ins. 200. Thus, in the case of a policy of insurance, if the risks and premium are entire, and the policy has once attached, so that the insurer might in any case be liable for a total loss, the law entitles him to retain the whole of the premium. By particular usages, however, the insurer may in such cases be obliged to return a part of the premium. Long *v.* Allan, 4 Dougl. 276. Where it is a usage of the underwriter to settle according to the adjustment of general average in a foreign port, such usage will be permitted to affect the rights of the parties, although the adjustment in the foreign port is different from what it would have been at the home port. 2 Phillips on Ins. (3d ed.) p. 163, *et seq.*; Power *v.* Whitmore, 4 M. & Sel. 141. See also, Vallance *v.* Dewar, 1 Camp. 503. — In Halsey *v.* Brown, 3 Day, 346, evidence was admitted of a custom of merchants in Connecticut and New York, that the freight of *money* received by the master is his perquisite, and that he is to be personally liable on the contract, and not the owners of the vessel. This case is cited and approved in Renner *v.* Bank of Columbia, 9 Wheat. 591. See also The Paragon, Ware, 322; Ougier *v.* Jennings, 1 Camp. 505, n.; Barber *v.* Brace, 3 Conn. 9; Stewart *v.* Aberdein, 4 M. & W. 211; McGregor *v.* Ins. Co. of Penn. 1 Wash. C. C. 39; Trott *v.* Wood, 1 Gall. 443; Cope *v.* Dodd, 13 Penn. St. Rep. 37; Cutter *v.* Powell, 6 T. R. 320; Raitt *v.* Mitchell, 4 Camp. 146. — Where bills or notes are made payable at certain banks, it is to be presumed that the parties intend that demand shall be made and notice given according to the usages of such banks, although the general rules of the law merchant may be superseded thereby. Thus, by the usage of the banks of the

(*a*) Thus, in an action on a policy of insurance on a voyage "to any port in the Baltic," evidence was admitted to prove that in mercantile contracts the Gulf of Finland is considered as within the Baltic. Uhde *v.* Walters, 3 Camp. 16. So also that Mauritius is considered as an East India Island, although treated by geographers as an African island. Robertson *v.* Money, R. & Mood. 75; Robertson *v.* Clarke, 1 Bing. 445.

ferent from that which they commonly bear, and which indeed by the rules of language, and in ordinary cases, would be expressed by another word. (*b*)

city of Washington, four days grace may be allowed. Demand made and notice given in accordance with such usage will be binding on the indorser, even when ignorant of the usage. Mills *v.* Bank of United States, 11 Wheat. 431. See also Renner *v.* Bank of Columbia, 9 Wheat. 581; Bank of Washington *v.* Triplet, 1 Pet. 25; Chicopee Bank *v.* Eager, 9 Metc. 583; Planters' Bank *v.* Markham, 5 How. [Miss.] 397; Lincoln and Kennebeck Bank *v.* Page, 9 Mass. 155; Bank of Columbia *v.* Fitzhugh, 1 H. & Gill, 239; Blanchard *v.* Hilliard, 11 Mass. 85. In the case of the Bridgeport Bank *v.* Dyer, 19 Conn. 136, the Bridgeport Bank, on Monday, the 1st of June, cashed for D. a check drawn on the Manhattan Co. in New York city. On Thursday the 4th, in accordance with the established usage of the Bridgeport Bank, it was sent by the captain of a steamboat to New York. In an action brought by the Bridgeport Bank against D. as indorser of such check, it was *held* that such usage was sufficient evidence of an agreement between the parties not to insist upon the rule of law regarding the transmission of checks. See also Kilgore *v.* Bulkley, 14 Conn. 363; and generally as to the usages of banks, and their binding force upon parties, Jones *v.* Fales, 4 Mass. 245; Peirce *v.* Butler, 14 Mass. 303; City Bank *v.* Cutter, 3 Pick. 415; Dorchester and Milton Bank *v.* New Eng. Bank, 1 Cush. 177; Bank of Utica *v.* Smith, 18 Johns. 230; Cookendorfer *v.* Preston, 4 How. 317. — In the case of Pollock *v.* Stables, 12 Q. B. 765, it was *held*, that if a party authorizes a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time, the vendor giving the purchaser notice, may sell, and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. And it is not necessary, in such action, to show that the principal knew of the custom. See Bayliffe *v.* Butterworth, 1 Exch. 425; Sutton *v.* Tatham, 10 Ad. & El. 27; Mitchell *v.* Newhall, 15 M. & W. 308; Moon *v.* Guardians of Whitney Union, 3 Bing. N. C. 814; Stewart *v.* Aberdein, 4 M. & W. 211.

(*b*) Thus, in the case of Smith *v.* Wilson, 3 B. & Ad. 728, where the lessee of a rabbit-warren covenanted to leave on the warren 10,000 rabbits, the lessor paying for them £60 per thousand, it was *held* that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *one hundred dozen*, or *twelve hundred*. In Hinton *v.* Locke, 5 Hill, 437, *Bronson*, J., said that he should have great difficulty in subscribing to this case, on the ground that the custom sought to be incorporated into the contract was "a plain contradiction of the express contract of the parties." But the usage admitted in Hinton *v.* Locke, and sanctioned by *Bronson*, J., seems to be nearly in equal opposition to the terms of the contract affected by it. The defendant, in that case, had promised to pay the plaintiff, who was a carpenter, twelve shillings *per day* for every man employed by him in repairing the defendant's house. Evidence was held admissible to show that, by a universal usage among carpenters, ten hours labor constituted a *day's work*. So that the plaintiff was entitled to charge *one and one fourth* day for every twenty-four hours, within which the men worked twelve hours and one half. *Bronson*, J., said: — "Usage can never be set up in contravention of the contract; but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or

This influence of custom was first admitted in reference to mercantile contracts. And indeed almost the whole of the law merchant, if it have not grown out of custom sanctioned by courts and thus made law, has been very greatly modified in that way. For illustration of this, we may refer to the law of bills and notes, insurance, and contracts of shipping generally. And although doubts have been expressed whether it was wise or safe to permit express contracts to be controlled, or, if not controlled, affected by custom in the degree in which it seems now to be established that they may be; (*c*) this operation of custom is now fixed by law, and extended to a vast variety of contracts; and indeed to all to which its privileges properly apply. And qualified and guarded as it is, it seems to be no more than reasonable. In fact, it may be doubted whether a large portion of the common law of England and of this country rests upon any other basis than that of custom. The theory has been held that the actual foundation of the whole was statute law, which the lapse of time has hidden out of sight. This is not very probable as a fact. The common law is every day adopting as rules and principles the mere usages of the community, or of those classes of the community who are most conversant with the matters to which these rules relate; it is certain that a large

phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied. Now here, the plaintiff was to be paid for his workmen at the rate of twelve shillings *per day*; but the parties have not told us by their contract what they meant by a day's work. It has not been pretended that it necessarily means the labor of twenty-four hours. How much, then, does it mean? Evidence of the usage or custom was let in to answer that question."

(*c*) Per Lord *Eldon*, in Anderson *v.* Pitcher, 2 B. & P. 168; per Lord *Denman*, Trueman *v.* Loder, 11 Ad. & El. 589, 597; Hutton *v.* Warren, 1 M. & W. 466. In Rogers *v.* Mechanics Ins. Co. 1 Sto. 603, 608, Mr. Justice *Story* uses the following language: — "I own myself no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to; but which is now subjected by our courts to more exact and well defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject; and therefore it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts." See also remarks of the same learned judge in the Schooner Reeside, 2 Sumn. 567; Hone *v.* Mutual Safety Ins. Co. 1 Sandf. 137; per *Tilghman*, C. J., in Stoever *v.* Whitman, 6 Binn. 419; per *Gibson*, C. J., in Snowden *v.* Warder, 3 Rawle, 101; Bolton *v.* Colder, 1 Watts, 363.

proportion of the existing law first acquired force in this way. At all events, even as to all law, whether common or statute, that rule must be admitted which is as sound as it is ancient, and which Lord *Coke* emphatically declares; *optimus interpres legum consuetudo.* (*d*)

It is obvious that the word "custom" is used in many senses, or rather that it embraces very many different degrees of the same meaning. By it may be understood that ancient and universal, and perfectly established custom, which is in fact law; or only a manner of doing some particular thing, in a small neighborhood, or by a small class of men, for a few years; or any measure of the same kind of meaning within these two extremes. Nor is it material what the custom is in this respect, provided it falls within the reason of the rule which makes it a part of the contract. And it comes within this reason only when it is *so far* established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose, the custom must be established and not casual, uniform and not varying, general and not personal, and known to the parties. (*e*) But the degree in which these character-

(*d*) 2 Inst. 18.

(*e*) Usage or custom must be *established.* Those customs which can be incorporated into contracts, on the ground that the parties must have contracted in reference to them, differ from the local customs of the common law in the length of time they must have existed to be valid. "The true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it." Per *Curiam,* in Smith *v.* Wright, 1 Caines, 43. In Noble *v.* Kennoway, Dougl. 510, where the usage established by evidence had existed for three years, Lord *Mansfield* said: — "It is no matter if the usage has only been for a year." So, a usage as to the measurement of morus multicaulis trees has been incorporated into a contract, although the trade in such trees has existed only for a short time. Barton *v.* McKelway, 2 N. Jer. 165. See also Dorchester and Milton Bank *v.* New England Bank, 1 Cush. 177; Taylor *v.* Briggs, 2 C. & P. 525. But see Robertson *v.* Jackson, 2 C. B. 412; Singleton *v.* Hilliard, 1 Strob. 203; Lewis *v.* Marshall, 7 M. & Gr. 729; Hayward *v.* Middleton, 3 McCord, 121; Rapp *v.* Palmer, 3 Watts, 178. — Usage must be *uniform.* It must constantly be observed in the same manner. In Wood *v.* Wood, 1 C. & P. 59, a usage was attempted to be shown relative to the return of cloths sent for inspection. Some of the witnesses spoke of three days as the time within which the buyer was to say whether he would buy them or not; others spoke of a week, and one of a month, as the time. The judge instructed the jury, that such a usage, to be binding, must be uniform, and that the usage proved was not so. The jury found accordingly. The usage must not be fluctuating and dependent upon price. Lawrence *v.* McGregor, Wright, 193. The observance of the usage must not be occasional. The Paragon, Ware, 322; Rushforth *v.* Hadfield, 7 East, 224. See also Trott *v.* Wood, 1 Gall. 443; Martin *v.* Delaware Ins. Co. 2 Wash.

istics must belong to the custom will depend in each case upon its peculiar circumstances. Suppose a contract to be entered into for the making of an article which has not been made until within a dozen years, and only by a dozen persons. Words are used in this contract, and their meaning is uncertain; but it is proved that these words have been used and understood in reference to this article, always, by all who have ever made it, in one way, and that both parties to the contract knew this. Then this custom will be permitted to explain and interpret the words of the parties. But if the article had been made an hundred years, in many countries, and by multitudes of persons, the same evidence of this use of the words, by a dozen persons for a dozen years, might not be sufficient to give to this practice all the force of custom. Other facts must be considered; as how far the meaning sought to be put on the words departs from their common meaning as given by the dictionary, or by general use, and whether other makers of this article used these words in various senses, or used other words to express the alleged meaning. Because the main question is always this; can it be said that both parties *must* have used these words in this sense, and that each party had good reason to believe that the other party so understood them.

C. C. 254; Rapp *v.* Palmer, 3 Watts, 178. Single isolated instances, unaccompanied with proof of general usage, will be insufficient to establish a custom. Cope *v.* Dodd, 13 Penn. St. Rep. 33; United States *v.* Buchanan, 8 How. 83, 102. — Usage must be *general*. In order that a custom may be incorporated into an agreement, by force of its existence, it must be shown to be so general, that a presumption of knowledge on the part of the parties arises. It must be *general* as opposed to *local*, for local usages cannot be brought in to affect the construction of written instruments, unless the knowledge of the parties is found. Bartlett *v.* Pentland, 10 B. & Cr. 760, 770; Gabay *v.* Lloyd, 3 B. & Cr. 793; Scott *v.* Irving, 1 B. & Ad. 605; Stevens *v.* Reeves, 9 Pick. 198; Clayton *v.* Gregson, 5 Ad. & El. 302. A usage, however, may be local in the sense of being confined to a particular port or place, and yet general in reference to the persons engaged in the trade in question. Baxter *v.* Leland, 1 Blatchf. C. C. 526. Where a usage between insurers and insured is offered in evidence, it must be the usage of the port where the policy is effected. Rogers *v.* Mechanics Ins. Co. 1 Sto. 607; Child *v.* Sun Mutual Ins. Co. 3 Sandf. 26. — The usage must be *general* as opposed to *partial*, or personal. Where it has reference to the commercial meaning of a word, or to a usage of trade proper, that is, to a particular manner of doing a thing, it must be general among all those merchants, in the same country, by whom the word is used, or who are engaged in the trade in question. Martin *v.* Delaware Ins. Co. 2 Wash. C. C. 254; Trott *v.* Wood, 1 Gall. 443; Macy *v.* Whaling Ins. Co. 9 Metc. 354, 365; Wood *v.* Wood, 1 C. & P. 59.

Nor is it necessary that the word which it is sought to interpret by custom should be, of itself, ambiguous. (*f*) For not only will custom explain an ambiguity, but will change the sense of a word from one which it bears almost universally, to another which is entirely different. Thus words of number are of all others least ambiguous; but, as we have seen, custom will interpret one thousand to mean one hundred dozen, or twelve hundred. (*g*)

Custom and usage are very often spoken of as if they were the same thing. But this is a mistake. Custom is the thing to be proved, and usage is the evidence of the custom. (*h*) Whether a custom exists is a question of fact. (*i*) But in

(*f*) See *ante*, p. 51, n. (*b*). Where words or clauses are doubtful in their meaning, much slighter evidence of usage will suffice to fix and determine their meaning. 1 Duer on Ins. 254. Where goods on board a vessel are insured "until discharged and safely landed," a resort to usage seems necessary to fix the meaning of the clause "until discharged and safely landed," the mode of discharge being dependent upon the usual course of the trade, and hence slighter evidence will be required. Noble *v.* Kennoway, Dougl. 510. Such is also the case where the usage of the port of departure is followed in taking in the cargo of a ship. Kingston *v.* Knibbs, 1 Camp. 508, n. See also Barton *v.* McKelway, 2 N. Jer. 165. This was an action on a contract to deliver a number of morus multicaulis trees, of "not less than *one foot* high." It was *held*, that it might be shown that by the universal usage and custom of all dealers in that article, the length was measured to the top of the ripe wood, rejecting the green immature top. See also Moxon *v.* Atkins, 3 Campb. 200.

(*g*) See *ante*, p. 51, n. (*b*).

(*h*) Per *Bayley*, J., in Kead *v.* Rann, 10 B. & Cr. 440.

(*i*) The custom must be established by the evidence of witnesses who speak directly to the fact of the existence of the custom. In Lewis *v.* Marshall, 7 M. & Gr. 729, evidence was offered to show that the terms "cargo" and "freight" would be considered to comprise steerage passengers and the net profit arising from their passage-money. *Tindal*, C. J., said: — "The character and description of evidence admissible for that purpose is the fact of a general usage and practice prevailing in the particular trade or business, not the judgment or opinion of the witnesses; for the contract may be safely and correctly interpreted with reference to the fact of usage; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto. But the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge." "The custom of merchants or mercantile usage does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions publicly expressed — but upon their *acts*." Per *Walworth*, C., in Allen *v.* Merchants Bank, 22 Wend. 222. See Edie *v.* East India Co. 2 Burr. 1228; Syers *v.* Bridge, Dougl. 527, 530; Crofts *v.* Marshall, 7 C. & P. 597; Winthrop *v.* Union Ins. Co. 2 Wash. C. C. 7; Rogers *v.* Mechanics Ins. Co. 1 Sto. 603, 607. Although a witness testifies generally to the fact of the usage, yet if he is unable to state a particular instance of the observance of the usage, his evidence should be rejected. Per Lord *Mansfield*, in Syers *v.* Bridge, Dougl. 530; 1 Duer on Ins. 183. See Vail *v.* Rice, 1 Seld. 155. On the other hand, particular instances in which a certain meaning has been given to certain words, or a certain course followed, are of no avail in establishing a custom, when unaccompanied by evidence direct to the fact of usage. Cope *v.* Dodd, 13 Penn. St. Rep. 33; Duvall *v.* Farmers Bank of Maryland, 9 Gill & Johns. 31.

the proof of this fact questions of law of two kinds may arise. One, whether the evidence is admissible, which is to be settled by the common principles of the law of evidence. The other, whether the facts stated are legally sufficient to prove a custom. If one man testified that he had done a certain thing once, and had heard that his neighbor had done it once, this evidence would not be given to the jury for them to draw from it the inference of custom if they saw fit, because it would be legally insufficient. But if many men testified to a uniform usage within their knowledge, and were uncontradicted, the court would say whether this usage was sufficient in quantity and quality to establish a custom, and if they deemed it to be so, would instruct the jury, that, if they believed the witnesses, the custom was proved. The cases on this subject are numerous. But no definite rule as to the proof of custom can be drawn from them, other than that derivable from the reason on which the legal operation of custom rests; namely, that the parties must be supposed to have contracted with reference to it.

As a general rule, the knowledge of a custom must be brought home to a party who is to be affected by it. But if it be shown that the custom is ancient, very general and well known, it will often be a presumption of law that the party had knowledge of it; (*j*) although if the custom ap-

(*j*) Where a custom is found to be general and notorious, and to have the other requisites of a valid custom, it is a conclusion of law that the parties must have contracted with reference to it, and their knowledge is conclusively presumed. In Clayton *v.* Gregson, 5 A. & El. 302, an arbitrator found that according to the custom and understanding of miners throughout a certain district, the words "level," "deeper than," and "below," in a lease, had certain meanings, which were in favor of one of the parties to the suit. Some of the parties to the lease did not live within the district. *Held*, that the existence of the custom stated, within such district, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion. *Littledale*, J., said: — "If the arbitrator had followed the words of the order, and found that the word 'level' (which is capable of many different meanings) meant 'according to the custom and understanding of miners' so and so; judgment might have been given for the defendant; there would have been a result in law in his favor. But the finding is limited to a particular district; which is as much as to say that the word which has a particular signification in this district may mean differently in others; and if that be so, it cannot follow as an inference of law that in the present contract it was used in the sense pointed out. It ought, therefore, to be shown as a matter of fact that the parties so used it." See also Stevens *v.* Reeves, 9 Pick. 198; Hinton *v.* Locke, 5 Hill, 439; 1 Duer on Ins. 277. But see Winsor *v.* Dillaway, 4 Metc. 221.

peared to be more recent, and less generally known, it might be necessary to establish by independent proof the knowledge of this custom by the party. (*k*) And one of the most common grounds for inferring knowledge in the parties, is the fact of their previous similar dealings with each other. (*l*) The custom might be so perfectly ascertained and universal that the party's actual ignorance could not be given in proof, nor assist him in resisting a custom. If one sold goods, and the buyer being sued for the price, defended on the ground of a custom of three months credit, the jury might be instructed that the defence was not made out, unless they could not only infer from the evidence the existence of the custom, but a knowledge of it by the plaintiff. But if the buyer had given a negotiable note at three months, no ignorance of the seller would enable him to demand payment without grace, even where the days of grace were not given by statute. In such a case, the reason of the law of custom — that the parties contracted with reference to it — seems to be lost sight of. But in fact the custom in such a case has the force of law; (*m*) an ignorance of which neither excuses any one, nor enlarges his rights.

No custom can be proved, or permitted to influence the construction of a contract, or vary the rights of parties, if the custom itself be illegal. For this would be to permit parties to break the law because others had broken it; and then to found their rights upon their own wrongdoings. (*n*)

(*k*) Clayton *v.* Gregson, 5 A. & El. 302; Scott *v.* Irving, 1 B. & Ad. 605; Stevens *v.* Reeves, 9 Pick. 198; Stewart *v.* Aberdein, 4 M. & W. 211.

(*l*) As that one of the parties was accustomed to effect insurance at a certain place, or with a certain company. Gabay *v.* Lloyd, 3 B. & Cr. 793; Bartlett *v.* Pentland, 10 B. & Cr. 760; Palmer *v.* Blackburn, 1 Bing. 61. Or that parties were accustomed to transact business at a certain bank. Bridgeport Bank *v.* Dyer, 19 Conn. 136. Or that the parties reside at the place where the usage exists. Bartlett *v.* Pentland, 10 B. & Cr. 760; Clayton *v.* Gregson, 5 Ad. & El. 302; Stevens *v.* Reeves, 9 Pick. 198. Evidence may be given of former transactions between the same parties for the purpose of explaining the meaning of the terms used in a written contract. Bourne *v.* Gatliff, 11 Cl. & Fin. 45, 70. But see Ford *v.* Yates, 2 M. & Gr. 549, where evidence was rejected that by the usual course of dealing between the parties, hops were sold on a credit of six months. The written contract was silent upon the subject. Previous dealings of parties are admissible, to give a more extended lien than that given by the common law. Rushforth *v.* Hadfield, 7 East, 224. See Loring *v.* Gurney, 5 Pick. 15.

(*m*) It may, however, be superceded by a custom allowing four days grace. Mills *v.* Bank of United States, 11 Wheat. 431; Cookenderfer *v.* Preston, 4 How. 317.

(*n*) See 1 Duer on Ins. 272.

Neither would courts sanction a custom, by permitting its operation upon the rights of parties, which was in itself wholly unreasonable. (*o*) In relation to a law, properly enacted, this inquiry cannot be made in a country where the judicial and the legislative powers are properly separated. But in reference to custom, which is a *quasi* law, and has often the effect of law, but has not its obligatory power over the court, the character of the custom will be considered, and if it be altogether foolish, or mischievous, the court will not regard it; and if a contract exist which only such a custom can give effect to, the contract itself will be declared void.

Lastly, it must be remembered that no custom, however universal, or old, or known, unless it has actually passed into law, has any force over parties against their will. Hence, in the interpretation of contracts, it is an established rule, that no custom can be admitted which the parties have seen fit expressly to exclude. (*p*) Thus, to refer again to the custom of allowing grace on bills and notes on time, there is no doubt that the parties may agree to waive this; and even the statutes which have made this custom law permit this waiver. And not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by a necessary implication; as by providing

(*o*) A usage among the owners of vessels at particular ports to pay bills drawn by masters for supplies furnished to their vessels in foreign ports, cannot bind them as acceptors of such bills. "A usage, to be legal, must be reasonable as well as convenient; and that usage cannot be reasonable which puts at hazard the property of the owners at the pleasure of the master, by making them responsible as acceptors on bills drawn by him, and which have been negotiated on the assumption that the funds were needed for supplies or repairs; and no evil can flow from rejecting such a usage." Per *Hubbard*, J., in Bowen *v.* Stoddard, 10 Metc. 375. So a usage among plaisterers to charge half the size of the windows at the price agreed on for work and materials is unreasonable and void. Jordan *v.* Meredith, 3 Yeates, 318. See also Thomas *v.* Graves, 1 Mills Const. R. [So. Car.] 308; Spear *v.* Newell, cited in Burton *v.* Blin, 23 Verm. 159; Bryant *v.* Commonwealth Ins. Co. 6 Pick. 131. For instances in which usages have been held reasonable, see Clark *v.* Baker, 11 Metc. 186; Thomas *v.* O'Hara, 1 Mills Const. R. [So. Car.] 303; Williams *v.* Gilman, 3 Greenl. 276; Bridgeport Bank *v.* Dyer, 19 Conn. 136; Conner *v.* Robinson, 2 Hill, [So. Car.] 354. Whether a usage is reasonable would seem to be a question of law. 1 Duer on Ins. 269. See remarks of *Tindal*, C. J., in Bottomley *v.* Forbes, 5 Bing. N. C. 127. And see Bowen *v.* Stoddard, 10 Metc. 375. The question of the reasonableness of a usage was left to the jury by Lord *Eldon* in Ougier *v.* Jennings, 1 Camp. 505, n. (*a*).

(*p*) Knox *v.* The Ninetta, Crabbe, 534. See *infra*, n. (*q*).

that the thing which the custom affects shall be done in a different way. (*q*) For a custom can no more be set up against the clear intention of the parties than against their express agreement.

SECTION X.

OF THE ADMISSIBILITY OF EXTRINSIC EVIDENCE IN THE INTERPRETATION OF WRITTEN CONTRACTS.

It is very common for parties to offer evidence external to the contract, in aid of the interpretation of its language.

(*q*) A usage cannot be incorporated into a contract, which is inconsistent with the terms of the contract. In the case of the Schooner Reeside, 2 Sumn. 567, it was attempted to vary the common bill of lading, by which goods were to be delivered in good order and condition, *the danger of the seas only excepted*, by establishing a custom, that the owners of packet vessels between New York and Boston should be liable only for damage to goods occasioned by their own neglect. But, per *Story*, J., "the true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible, to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted, by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention to control, vary, or contradict the most formal and deliberate written declarations of the parties." See Blackett *v.* Royal Exch. Assur. Co. 2 Cr. & Jer. 244; Hinton *v.* Locke, 5 Hill, 437; Grant *v.* Maddox, 15 M. & W. 737; Yates *v.* Pym, 6 Taunt. 446; Keener *v.* Bank of United States, 2 Barr, 237; McGregor *v.* Ins. Co. of Penn. 1 Wash. C. C. 39; Sweet *v.* Jenkins, 1 Rhode Is. 147. A custom, that a tenant on quitting shall leave the manure to be expended upon the land, he being entitled to be paid for the same, is excluded by an express stipulation in the lease that the tenant "should not sell or take away any of the manure." The tenant is not entitled to recover the value of the manure so left. "It was altogether idle," said Lord *Lyndhurst*, C. B., "to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." Roberts *v.* Barker, 1 Cr. & M. 808. See also Webb *v.* Plummer, 2 B. & Ald. 746. A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled on quitting to receive from the landlord or incoming tenant a reasonable allowance for seeds and labor bestowed on the ara-

The general rule is, that such evidence cannot be admitted to contradict or vary the terms of a valid written contract; or, as the rule is expressed by writers on the Scotch law, "writing cannot be cut down or taken away by the testimony of witnesses." (*r*) There are many reasons for this rule. One is, the general preference of the law for written evidence over unwritten; or, in other words, for the more definite and certain evidence over that which is less so; a preference which not only makes written evidence better than unwritten, but classifies that which is written. For if a negotiation be conducted in writing, and even if there be a distinct proposition in a letter, and a distinct assent, making a contract; and then the parties reduce this contract to writing, and both execute the instrument, this instrument controls the letters, and they are not permitted to vary the force and effect of the instrument, although they may sometimes be of use in explaining its terms. Another is, the same desire to prevent fraud which gave rise to the statute of frauds; for as that statute requires that certain contracts shall be in writing, so this rule refuses to permit contracts which are in writing to be controlled by merely oral evidence. But the principal cause alleged in the books and cases is, that when parties, after whatever conversation or preparation, at last reduce their agreement to writing, this may be looked upon as the final consummation of their negotiation, and the exact expression of their purpose. And all of their earlier agreement, though made apparently while it all lay in conversation, which is not now incorporated into their written contract, may be considered as intentionally rejected. (*s*) The parties write the contract when they

ble land in the last year of the tenancy, and is bound to leave the manure for the landlord if he will purchase it,—is not excluded by a stipulation in the lease under which he holds, that he will consume three fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. Hutton *v.* Warren, 1 M. & W. 466. See also Senior *v.* Armitage, Holt, N. P. 197; Syers *v.* Jonas, 2 Exch. 111. If the legislature has given to a particular word denoting quantity a definite meaning, no evidence of usage can be given to show that it is used in a different sense. Smith *v.* Wilson, 3 B. & Ad. 728. See Helm *v.* Bryant, 11 B. Mon. 64; and note to Wigglesworth *v.* Dallison, 1 Smith's Lead. Cas. 308 b.

(*r*) Tait on Ev. 326.

(*s*) Preston *v.* Merceau, 2 Wm. Bl. 1249; Carter *v.* Hamilton, 11 Barb. 147; The Troy Iron and Nail Factory

are ready to do so, for the very purpose of including all that they have finally agreed upon, and excluding every thing else, and making this certain and permanent. And if every written contract were held subject to enlargement, or other alteration, according to the testimony which might be offered on one side or the other as to previous intention, or collateral facts, it would obviously be of no use to reduce a contract to writing, or to attempt to give it certainty and fixedness in any way. (*t*)

It is nevertheless certain that some evidence from without must be admissible in the explanation or interpretation of every contract. If the agreement be that one party shall convey to the other, for a certain price, a certain parcel of land, it is only by extrinsic evidence that the persons can be identified who claim or are alleged to be parties, and that the parcel of land can be ascertained. It may be described by bounds, but the question then comes, where are the streets, or roads, or neighbors, or monuments referred to in the description ; and it may sometimes happen that much evidence is necessary to identify these persons or things. Hence we may say, as the general rule, that as to the *parties* or the *subject-matter* of a contract, extrinsic evidence may and must be received and used to make them certain, if necessary for that purpose. (*u*) But as to the terms, conditions, and limit-

v. Corning, 1 Blatch. C. C. 467; Meres *v.* Ansell, 3 Wils. 275; Hakes *v.* Hotchkiss, 23 Verm. 231; Vermont Central R. R. Co. *v.* Estate of Hills, Id. 681. "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." Per *Abbott*, C. J., in Kain *v.* Old, 2 B. & Cr. 634. See also Vandervoort *v.* Smith, 2 Caines, 155; Mumford *v.* McPherson, 1 Johns. 413; Pickering *v.* Dowson, 4 Taunt. 786.

(*t*) "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory." Countess of Rutland's case, 5 Rep. 26 a; Carter *v.* Hamilton, 11 Barb. 147; Rogers *v.* Atkinson, 1 Georg. 12; Wynn *v.* Cox, 5 Georg. 373.

(*u*) "When there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given till it is shown by extrinsic evidence what estate it was that was purchased of A., or what farm was in the occupation of B." Per Sir William *Grant*, in Sanford *v.* Raikes, 1 Mer. 653. And see Jackson *v.* Parkhurst, 4 Wend. 369; Abbot *v.* Massie, 3 Ves. 148; McCullough *v.* Wainwright, 14 Penn. St. 171; Newton *v.* Lucas, 6 Sim. 54; Jackson *v.* Sill, 11 Johns. 201. "Speaking philosophically," says *Rolfe*, B., "you must

ations of the agreement, the written contract must speak exclusively for itself. Hence, too, a false description of person or thing has no effect in defeating a contract, if the error can be distinctly shown and perfectly corrected, by other matter in the instrument. (*v*)

always look beyond the instrument itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places. There may indeed be no difficulty in ascertaining who is meant, when a person who has five or six names, and some of them unusual ones, is described in full, while on the other hand, a devise simply to John Smith would necessarily create some uncertainty." Clayton *v.* Lord Nugent, 13 M. & W. 207. See also Owen *v.* Thomas, 3 M. & K. 353. Whether parcel or not, or appurtenant or not, is always matter of evidence. Per *Buller*, J., in Doe *v.* Burt, 1 T. R. 704; Doe *v.* Webster, 12 Ad. & El. 442; Waterman *v.* Johnson, 13 Pick. 261; per *Barbour*, J., in Bradley *v.* Wash. A. & G. Steam Packet Co. 13 Pet. 89, 97; per Lord *Ellenborough*, in Goodtitle *v.* Southern, 1 M. & S. 301; Wilson *v.* Robertson, Harp. Eq. 56.

(*v*) Bac. Max. Reg. 25. *Falsa demonstratio non nocet.* Thomas *v.* Thomas, 6 T. R. 671. "If the thing described is sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man conveys his house in D., which was R. Cotton's, when it was Thomas Cotton's." Com. Dig. Fait, (E 4). Where one devised all his "freehold houses in Aldersgate Street," he having only leasehold houses there, the leasehold were held to pass. Day *v.* Trigg, 1 P. Wms. 286. See also Doe *v.* Cranstoun, 7 M. & W. 1; Nelson *v.* Hopkins, 11 Eng. Law & Eq. 66. Where premises are sufficiently described otherwise, any reference to the quantity of land may be rejected as *falsa demonstratio*. Llewellyn *v.* Earl of Jersey, 11 M. & W. 183; Shep. Touch. 248. So where there was a bequest to "John and Benedict, sons of J. S.," who had two sons, James and Benedict, it was *held* that James might take. Dowsett *v.* Sweet, Ambl. 175. See Connolly *v.* Pardon, 1 Paige, 291; Doe *v.* Galloway, 5 B. & Ad. 43; Duke of Dorset *v.* Lord Hawarden, 3 Curt. 80; Tudor *v.* Terrel, 2 Dana, 47; Gynes *v.* Kemsley, Freem. K. B. 293; Chamberlaine *v.* Turner, Cro. Car. 129; Doe *v.* Parry, 13 M. & W. 356; Goodtitle *v.* Southern, 1 M. & Sel. 299; Beaumont *v.* Fell, 2 P. Wms. 140.—The characteristic of cases falling under the maxim *falsa demonstratio non nocet*, is that the description, so far as it is false, applies to no subject at all, and so far as it is true, to one subject only. Per *Alderson*, B., in Morrell *v.* Frith, 4 Exch. 591, 604; Wigram on Wills, sec. 133.—The case of Beaumont *v.* Fell, 2 P. Wms. 140, if it can be sustained at all, must be sustained as falling under the maxim *falsa demonstratio non nocet*. Before stating the case, it may be well to remark, that evidence may always be given that a testator was accustomed to call particular individuals by peculiar names, other than those by which they were commonly known, and a devise or bequest may take effect in favor of such person who is designated in the devise or bequest by a nickname, provided the application of the nickname is sufficiently certain. Baylis *v.* Attorney-General, 2 Atk. 239; per Lord *Abinger*, in Doe *v.* Hiscocks, 5 M. & W. 368; Rishton *v.* Cobb, 5 Myl. & Cr. 145; Lee *v.* Pain, 4 Hare, 251, 252; Parsons *v.* Parsons, 1 Ves. Jr. 266; per *Rolfe*, B., in Clayton *v.* Lord Nugent, 13 M. & W. 207; White *v.* Bradshaw, 13 Eng. Law & Eq. 296; Powell *v.* Biddle, 2 Dall. 70. In Beaumont *v.* Fell, there was a devise of a legacy of £500 to "Catharine Earnley." No person of that name claimed the legacy. It was claimed by Gertrude Yardley. It appeared that the testator's voice when he gave instructions for writing his will was very low, and hardly intelligible; that the testator usually called Gertrude Yardley by the name of *Gatty*, which the scrivener might easily mistake for *Katy*. The scrivener not well understanding who the legatee was, owing to the feebleness of the voice of the testator, the testator referred him to J. S. and wife, who afterwards declared that Gertrude Yardley was the person intended. So

Where the language of an instrument has a settled legal meaning, its construction is not open to evidence. Thus a

far as this case sanctions the admission of evidence of intention, it is now of no authority. See *infra*, n. (s). The only ground, perhaps, upon which the case can be sustained, is that "Earnley" might be rejected as *falsa demonstratio*, and that "Catharine" was a sufficiently certain designation of the individual called "Gatty" by the testator. Per Lord *Abinger*, in Doe *v.* Hiscocks, 5 M. & W. 371. The case of Selwood *v.* Mildmay, 3 Ves. 306, has been regarded as falling under the maxim, "*falsa demonstratio.*" In this case a testator gave to his wife the interest and proceeds of £1,250, "part of my stock in the 4 per cent. annuities of the Bank of England, for and during the term of her natural life, together with all such dividends as shall be due upon the said £1,250 at the time of my decease." At the time he made his will he had no stock in the 4 per cent. annuities, but he had had some, which he had sold out, and had invested in Long Annuities. The Master of the Rolls, Sir R. P. *Arden*, said: — "It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock. The distinction is this; if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi;* but if it is a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified." According to the view taken of this case by *Tindal*, C. J., in Miller *v.* Travers, 8 Bing. 244, the parol evidence as to the condition of the testator's property was received, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeathe the long annuities, which he had purchased with the produce of the 4 per cent. stock; and the result of the cause was to substitute another specific subject, in the place of a specific legacy which the will purported to bequeathe; — to substitute the long annuities, which the testator had and did not purport to give, for the 4 per cent. bank annuities, which he had not and did purport to give. But it would seem difficult to support the decree on this ground. The true view of the case seems to be that taken by Lord *Langdale*, in Lindgren *v.* Lindgren, 9 Beav. 358, namely, that the parol evidence as to the condition of the testator's property showed that a general and not a specific legacy was intended. After stating, in the language of the decree, that the evidence was admitted "to prove, not that there was a mistake, for that was clear, but to show how it arose," his lordship continued: — "It is very necessary to observe, that in the case of Selwood *v.* Mildmay, the evidence was received only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeathe the long annuities, which he had purchased with the produce of the 4 per cent. stock, and that the result of the cause was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeathe; — not to substitute the long annuities, which the testator had and did not purport to give, for the 4 per cent. bank annuities, which he had not and did purport to give. The absence of the fund purported to be given showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was *held* that the legatees were entitled to payment out of the general personal estate." And see to the same effect, Sawrey *v.* Rumney, 15 Eng. Law & Eq. 4. In Wrotesley *v.* Adams, Plowd. 191, it is laid down that "there is a diversity where a certainty is added to a thing that is uncertain, and where to a thing certain. For if I release all my right in all my lands in Dale, which I have by descent on the part of my father, and I have lands in Dale by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void, and so the words of certainty, viz., which I have by descent on the part of my father, being added to

promise to pay money, no time being expressed, means a

the general words which were uncertain, are of effect. But if the release had been of Whitacre in Dale, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary, but superfluous." In Doe *v.* Parkin, 5 Taunt. 321, there was a devise of "all my messuages, &c. in T., and now in my own occupation." The testator had two messuages in T., of which he occupied only one. *Held*, that only that one passed by the devise. In this case there was certainty added to what was uncertain. See per *Parke*, J., in Doe *v.* Galloway, 5 B. & Ad. 51. Words of *certainty*, however, as they are called in Plowden, following *general* or *uncertain* words, will not be construed as restrictive where the effect of doing so would be to render the *general* or *uncertain* words wholly inoperative, and where the *certain* words may be rejected as *falsa demonstratio*. A testator devised to J. S. "all those my three messuages, with the gardens, close of land, and *all other my real estate*, whatsoever, situate at Little Heath, in the parish of F., now in the occupation of myself, and A. and B." At the date of the will, and at the death of the testator, he was possessed of three messuages, with gardens, and a close of land, at Little Heath, which were in the occupation of himself, and A. and B. He had also the reversion in a house and garden, situate at Little Heath, which was in the occupation of C., who was entitled to it for life. He had no other property in the parish of F. *Held*, that the house and garden in the occupation of C. passed under the general devise to J. S. Doe *v.* Carpenter, 1 Eng. Law & Eq. 307. See also Nightingall *v.* Smith, 1 Exch. 879. In Morrell *v.* Fisher, 4 Exch. 591, there was a devise to the following effect; — "all my leasehold farm-house, homestead, lands, and tenements at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of B. as tenant to me." B. occupied a farm at Headington, which was leased to the testator by Magdalen College, and there were two parcels of land also held by the testator under Magdalen College, and situated at Headington, but not in the occupation of B. *Held*, that the description of the lands being in the possession of B. could not be rejected as *falsa demonstratio*, and consequently that the two parcels did not pass under the devise. In this case, *Alderson*, B., in delivering the judgment of the court, said: — "The question is not what the testator intended to have done, but what the words of the clause mean, after applying to it the established rules of construction. One of these rules is, '*Falsa demonstratio non nocet;*' another is, '*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*' The first rule means that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is that the description, so far as it is false, applies to no subject at all; and so far as it is true applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to pass only those lands wherein the circumstances are true. Whether these maxims, or rather the first, has been correctly acted upon in some of the decided cases, in which the courts have professed, or intended so to do, need not now be inquired into. They certainly are acknowledged rules of construction. Is there then, in the present case, an adequate and sufficient description of the subject of the devise, so as to enable us to treat the description of the land being in the possession of Burrows as a false demonstration, and reject it according to the first rule? Now if we read the language of the devise in its ordinary and obvious sense, it is a gift first, of 'all his leasehold farm-house, homestead, lands, and tenements at Headington, held under Magdalen College, and occupied by Burrows.' There is no doubt that the farm-

promise to pay it on demand, and evidence that a payment at a future day was intended is not admissible. (*w*)

There are reasons, although perhaps no direct authority, for applying to the construction of contracts a distinction which is taken in respect of wills. If the presumption is *against* the apparent and natural effect of an instrument, it may be rebutted by parol evidence; but not so if the legal presumption is with the instrument. As if a testator gives two legacies to the same party, in such a way that the presumption of law is that they are but one legacy, evidence is receivable to show that the testator said what he meant, and that a double gift was intended. But if they are so given that the law holds that what is twice given was meant to be twice given, evidence is not receivable to show that but a single gift was intended. (*x*)

Where the agreement between the parties is one and entire, and only a part of this is reduced to writing, it would seem that the residue may be proved by extrinsic evidence. (*y*)

house passed, for it was a 'leasehold, and in the occupation of Burrows;' and if there was one acre, and one only, of that character, and that was not in the possession of Burrows, that would have passed, and the description would have been rejected as inapplicable to any such. The will then professes to give all the testator's lands and tenements at Headington, leasehold under the college, containing about 170 acres, in the possession of Burrows. The description by acreage defines nothing, for it is inapplicable to any subject, [whether the two parcels were added or not, the amount would have been very different from 170 acres,] and therefore that may be rejected, and then there is nothing to define any lands in particular. The second maxim then applies, and all the demonstrations here being true as to the rest of the land, exclusive of these two parcels, and part only being true as to these parcels, they do not pass." See also Doe *v.* Bower, 3 B. & Ad. 453; Bac. Max. Reg. 13; Doe *v.* Hubbard, 15 Q. B. 227; Newton *v.* Lucas, 6 Sim. 54.

(*w*) Warren *v.* Wheeler, 8 Metc. 97; Atwood *v.* Cobb, 16 Pick. 227; Ryan *v.* Hall, 13 Metc. 520; Thomson *v.* Ketcham, 8 Johns. 189. But a promise to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time. Warren *v.* Wheeler, 8 Met. 97. And in such a case, it seems that a contemporaneous verbal agreement that the matter stipulated for in a written agreement should be done at a particular time, would be admissible as bearing upon the question of reasonable time. Per *Shaw*, C. J., in Atwood *v.* Cobb, 16 Pick. 231. And see Barringer *v.* Sneed, 3 Stew. 201; Simpson *v.* Henderson, M. & Malk. 300.

(*x*) Hall *v.* Hill, 1 Connor & Lawson, 120, 1 Drury & Warren, 94. See also Spence on the Equitable Jurisdiction of the Court of Chancery, vol. 1, p. 565, *et seq.*, where this point is fully examined, and the authorities cited.

(*y*) In Jeffery *v.* Walton, 1 Stark. 267, in an action for not taking proper care of a horse hired by the defendant of the plaintiff, the following memorandum, made at the time of hiring, was offered in evidence: — "Six weeks at two guineas — Wm. Walton, jun'r." Lord *Ellenborough* regarded the memorandum as incomplete, but conclusive as far as it went. "The written agree-

And if there are cotemporaneous writings between the same parties, so far in relation to the same subject-matter that they may be deemed part and parcel of the contract, although not referred to in it, they may be read in connection with it; (*z*) but not so as to affect a third party who relied upon the contract, and knew nothing of these other writings.

Recitals in an instrument may be qualified or contradicted by extrinsic evidence, if the law of estoppel does not prevent. So the date of an instrument, (*a*) or the amount of the consideration paid, (*b*) may be varied by testimony. And an instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, (*c*) or for fraud, (*d*) or duress, or any incapacity of the parties, (*e*) or any illegality in the agreement. (*f*) In the same way, ex-

ment," said he, "merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement." See Knapp *v.* Harden, 6 C. & P. 745; Deshon *v.* Merchants Ins. Co. 11 Metc. 199; Edwards *v.* Goldsmith, 16 Penn. St. 43.

(*z*) In Colburn *v.* Dawson, 4 Eng. Law & Eq. 378, the plaintiffs wrote to defendant: "We are doing business with B., and require a guaranty to the amount of £200, and he refers us to you." Defendant wrote in answer: "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was: "I hereby engage to guaranty to Messrs. Colburn, iron-masters, £200 for iron received from them for B. as annexed." *Held*, that these three documents should be read together, and that the words, "we are doing business," taken with the rest, showed that the consideration for the defendant's undertaking was that the plaintiff should continue to supply B. with goods, and that there was therefore a good consideration. See also Hunt *v.* Frost, 4 Cush. 54; Hanford *v.* Rogers, 11 Barb. 19; Shaw *v.* Leavitt, 3 Sandf. Ch. 163; Gammon *v.* Freeman, 31 Maine, 243; Kenyon *v.* Nichols, 1 Rhode Isl. 411.

(*a*) Breck *v.* Cole, 4 Sandf. 79; Abrams *v.* Pomeroy, 13 Ill. 133; Hall *v.* Cazenove, 4 East, 477. Where, however, the date is referred to in the body of the instrument, as fixing the time of payment, as where there is a promise to pay money or do some act "in sixty days from date," the date cannot be altered or varied by parol evidence. Joseph *v.* Bigelow, 4 Cush. 82.

(*b*) Clifford *v.* Turrell, 1 You. & Col. Cas. in Ch. 138; Rex *v.* Scammonden, 3 T. R. 474; Belden *v.* Seymour, 8 Conn. 304. As to the effect of the recital in a deed of conveyance of the payment of the consideration-money, *as evidence* of such payment, the English and American authorities differ, the former holding such recital to be *conclusive* evidence, and the latter only *primâ facie*. See the cases collected and arranged in 1 Gr. Ev. § 26, n. (1).

(*c*) Erwin *v.* Saunders, 1 Cow. 249; Foster *v.* Jolly, 1 Cr. M. & Ros. 703. The case of Bowers *v.* Hurd, 10 Mass. 427, so far as it contains a contrary doctrine, has been overruled. See Hill *v.* Buckminster, 5 Pick. 391; Parish *v.* Stone, 14 Id. 198.

(*d*) Erwin *v.* Saunders, 1 Cow. 249; Van Valkenburgh *v.* Roun, 12 Johns. 337.

(*e*) Mitchell *v.* Kingman, 5 Pick. 431.

(*f*) Collins *v.* Blantenn, 2 Wils. 347.

trinsic evidence may show a total discharge of the obligations of the contract; or a new agreement substituted for the former, which it sets aside; (*g*) or that the time when, (*h*) or the place where, (*i*) certain things were to be done, had been changed by the parties; or that a new contract, which was additional and supplementary to the original contract, had been made; (*j*) or that damages had been waived, (*k*) or that a new consideration, in addition to the one mentioned, has been given, if it be not adverse to that named in the deed. (*l*) And if no consideration be named, one may be proved. (*m*)

A receipt for money is peculiarly open to evidence. It is only *primâ facie* evidence either that the sum stated has been paid, or that any sum whatever was paid. (*n*) It is in fact not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admission of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt, or recites the receiving of money or of goods, contains also terms, conditions, and agreements, or assignments. Such an instrument, as to every thing but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but as to the receipt itself, it may be varied or contradicted by extrinsic testimony, in the same manner as if it contained nothing else. (*o*)

If a contract refer to principles of science, or art, or use

(*g*) Munroe *v.* Perkins, 9 Pick. 298; Goss *v.* Lord Nugent, 5 B. & Ad. 58.

(*h*) Keating *v.* Price, 1 Johns. Cas. 22; Dearborn *v.* Cross, 7 Cow. 48; Neil *v.* Cheves, 1 Bayley, 537; Cuff *v.* Penn, 1 M. & S. 21.

(*i*) Robinson *v.* Batchelder, 4 N. H. 40.

(*j*) Jeffery *v.* Walton, 1 Stark. 267.

(*k*) Fleming *v.* Gilbert, 3 Johns. 528.

(*l*) Clifford *v.* Turrell, 1 Y. & Coll. Cas. in Ch. 138; Bedell's case, 7 Rep. 40 a; Shaw *v.* Leavitt, 3 Sandf. Ch. 163, 173; Villers *v.* Beamont, Dyer, 146 a; Doe *d.* Milburn *v.* Salkeld, Willes, 677.

(*m*) Pott *v.* Todhunter, 2 Coll. 76.

(*n*) Dutton *v.* Tilden, 13 Penn. St. 46; Bell *v.* Bell, 12 Penn. St. 235; Kirkpatrick *v.* Smith, 10 Humph. 188; Cole *v.* Taylor, 2 N. Jer. 59; Fuller *v.* Crittenden, 9 Conn. 401; Straton *v.* Rastall, 2 T. R. 366.

(*o*) Where in a receipt money was acknowledged to have been received "for safe keeping," it was *held* that no evidence was admissible to show that the money was not deposited for safe keeping, but was in discharge of a debt. Tisloe *v.* Graeter, 1 Blackf. 353. See also Egleston *v.* Knickerbacker, 6 Barb. 458; Smith *v.* Brown, 3 Hawks, 580; May *v.* Babcock, 4 Ohio, 346; Stone *v.* Vance, 6 Ham. (Ohio) 246; Wood *v.* Perry, Wright, (Ohio) 240; Graves *v.* Harwood, 9 Barb. 477; Wayland *v.* Mosely, 5 Ala. 430; O'Brien *v.* Gilchrist, 34 Maine, 544.

the technical phraseology of some profession or occupation, or common words in a technical sense, or the words of a foreign language, their exact meaning may be shown, as we have already remarked, by the testimony of "experts," who are persons possessing the peculiar knowledge and skill requisite for the interpretation of the contract. (*p*) It may be added that the testimony of the experts is so far a matter for the jury, that if it be contradictory and conflicting, or uncertain, it is to be weighed by them. But the legal effect of the words or phrases, when their meaning is ascertained by experts, belongs to the construction of the contract, and is for the court. (*q*)

Questions depending upon the construction or interpretation of a contract sometimes arise between third parties, who had no privity or participation in the original contract, and nothing to do with the language used in it. In such cases, much of the reason which prohibits the introduction of ex-

(*p*) Goblet *v.* Beechey, 3 Sim. 24; Wigram on Wills, Appendix, No. 1; Masters *v.* Masters, 1 P. Wms. 425; Norman *v.* Morrell, 4 Ves. 769; Shore *v.* Wilson, 9 Cl. & Fin. 511; Cabarga *v.* Leeger, 17 Penn. St. 514. The court may always inform itself by means of books and treatises as to the meaning of the terms used in an instrument, especially where that instrument is ancient, or uses scientific terms. Per *Tindal*, C. J., in Shore *v.* Wilson, 9 Cl. & Fin. 568; per *Eyre*, C. B., in Attorney-General *v.* Plate-Glass Co. 1 Anst. 39, 44.

(*q*) In Armstrong *v.* Burrows, 6 Watts, 266, where the only matter in dispute was as to the date of a receipt given by the plaintiff, the date being illegible, the court upon the trial assumed an exclusive right to decipher the instrument, and to determine the date, upon the evidence given. Upon error, *Gibson*, C. J., in reversing the judgment of the court below, said: — "That the court assumed an exclusive right to decipher the contested letters is both true and fatal. It doubtless belongs to it to interpret the meaning of written words; but this extends not to the letters, for to interpret and to decipher are different things. A writing is read before it is expounded, and the ascertainment of the words is finished before the business of exposition begins. If the reading of the judge were not matter of fact, witnesses would not be heard in contradiction of it; and though he is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters would be the same that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were, therefore, not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent." See Cabarga *v.* Leeger, 17 Penn. St. 514; Jackson *v.* Ransom, 18 Johns. 107; Sheldon *v.* Benham, 4 Hill, 129. In Remon *v.* Hayward, 2 Ad. & El. 666, it is said that a question arising at Nisi Prius, before Lord *Denman*, from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, his lordship decided the question himself, and refused to have it put to the jury.

trinsic evidence fails, and with it the prohibition fails. It would be obviously unjust to hold these parties responsible for words which neither of them selected or adopted, or had any power to exclude or to qualify. They may therefore show by extrinsic evidence what the agreement between the original parties, which purports to be expressed by the written contract, really was, so far as this is necessary to establish their actual rights, and to do full justice between them. (*r*)

The rule in relation to extrinsic evidence prohibits the admission of oral testimony "to contradict or vary" the terms of a valid written contract. Therefore, there is nothing in this rule to prevent the introduction of such testimony for the purpose of *explaining* the contract. But here a distinction is taken, which, if it did not originate with Lord *Bacon*, was first clearly stated by him; it is the distinction between a *patent ambiguity* and a *latent ambiguity*. (*s*)

(*r*) Rex *v.* Scammonden, 3 T. R. 474; The King *v.* Laindon, 8 T. R. 379; Taylor *v.* Baldwin, 10 Barb. 582; Krider *v.* Lafferty, 1 Whart. 303. The parties to an instrument may show the true character of the transaction between them in controversies with strangers. Strader *v.* Lambeth, 7 B. Mon. 589; Reynolds *v.* Magness, 2 Iredell, 26; Venable *v.* Thompson, 11 Ala. 147.

(*s*) The rule as to *latent* and *patent ambiguities* has been regarded as furnishing a decisive test by which to determine in all cases whether extrinsic evidence is admissible to aid in the interpretation and construction of a written instrument. It has been looked upon as covering the whole ground of the admission of extrinsic evidence, and the confusion which has existed upon this subject is attributable in a great degree to the loose and uncertain meanings attached to the terms *latent* and *patent ambiguities*. The term ambiguity itself, which properly means the having two meanings, is misapplied when used to comprehend all doubts and uncertainties in respect to the meaning of written instruments. As the term *patent* has been understood, it is not true, that a patent ambiguity is unexplainable by extrinsic evidence. Where words are, in the truest sense of the term, *ambiguous*, that is, have double meanings, not simply double applications, as mere names, the uncertainty is inherent in the word, and is of course necessarily *patent*. Thus the word "freight," as it was remarked by Mr. Justice *Story*, in Peisch *v.* Dickson, 1 Mason, 10, is susceptible of two meanings, and it might be doubtful on the face of an instrument whether it referred to goods on board a ship, or to an interest in its earnings. There can be no doubt that in such a case extrinsic evidence of the *circumstances* under which the instrument was made would be admissible to remove the doubt or uncertainty. See also, as to the meaning of the word "port," De Longuemere *v.* N. Y. Fire Ins. Co. 10 Johns. 120. So although a devise or grant to "one of the sons of A.," he having several sons, would be void for uncertainty, (Altham's case, 8 Rep. 155 a,) yet there is no reason why a devise "to one of the sons of A.," he being dead, and having only one son, would not be good. Wigram on Wills, sec. 79. Here a *patent* ambiguity would be removed by evidence of extrinsic facts. In Price *v.* Page, 4 Ves. 679, there was a legacy to ——— Price, the son of ——— Price. The plaintiff was the only claimant. He was a son of a

"There be two sorts of ambiguities of words; the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which

niece of the testator, the only relation of the name of Price, and lived upon terms of intimacy with the testator. He was held entitled.— The rule that no evidence is admissible to remove a *patent ambiguity* would be strictly correct, if by *patent ambiguity* we mean that state of uncertainty which exists where it is perfectly clear from the face of the instrument to be construed, either that no certain subject has been selected, upon which the instrument can operate or take effect, or that no certain person or persons have been selected to be benefited or affected by the instrument, or that no certain purpose has been indicated in respect to the subjects or objects. Thus, a devise to "twenty of the poorest of the testator's kindred," is void for uncertainty. Webb's case, 1 Rol. Abr. 609. So a bequest of "some of my best linen." Peck *v.* Halsey, 2 P. Wms. 387. So also a devise to this effect: "I request a handsome gratuity to be given to each of my executors." Jubber *v.* Jubber, 9 Sim. 503. So a devise to the "best men of the White Towers." Year Book, 49 Ed. 3, cited in Winter *v.* Perratt, 9 Cl. & Fin. 688. So a bequest of a legacy to be distributed "among the real distressed private poor of Talbot county," there being no discretion given to the executors. Trippe *v.* Frazier, 4 H. & Johns. 446. The same would be true of a bequest, "to be applied towards feeding, clothing, &c., the poor children of C. county, which attend the poor or charity school established at H., in said county. Dashiell *v.* Attorney-General, 6 H. & Johns. 1. See also Dashiell *v.* Attorney General, 5 H. & Johns. 392; Beal *v.* Wyman, Styles, 240; Jackson *v.* Craig, 3 Eng. Law & Eq. 173; Baker *v.* Newton, 2 Beav. 112; Fowler *v.* Garlike, 1 Rus. & Myl. 232; Attorney-General *v.* Sibthorp, 2 Rus. & Myl. 107; Mason *v.* Robinson, 2 Sim. & Stu. 295; Winter *v.* Perratt, 9 Cl. & Fin. 606; Doe *v.* Carew, 2 Q. B. 317; Weatherhead's lessee *v.* Baskerville, 11 How. 329. In very few cases, however, will it be perfectly clear upon the face of the instrument that the *intent* is so *uncertain*, that no evidence of *extrinsic facts* can make it certain. — The term "latent ambiguity" is used very loosely to mean any doubt or uncertainty raised by extrinsic evidence, and very frequently there is a failure to distinguish between cases where a description is equally applicable to either one of two or more persons, or of two or more things, and the other cases in which a doubt is raised by extrinsic facts, such as cases of defective and inaccurate description. This distinction is of great consequence, especially in reference to the kind of evidence admissible to remove the doubt or uncertainty, for it is only in the case of the double application of words of description that evidence of *intention direct* is admissible to remove the uncertainty. It may be shown which of two or more persons or things was *intended* by a description equally applicable to all. Altham's case, 8 Rep. 155 a; Jones *v.* Newman, 1 Wm. Bl. 60; Doe *v.* Morgan, 1 Cr. & M. 235; Doe *v.* Allen, 12 Ad. & El. 451; Osborn *v.* Wise, 7 C. & P. 761; Blundell *v.* Gladstone, 12 Eng. Law & Eq. 52; Careless *v.* Careless, 19 Ves. 601; Carruthers *v.* Sheddon, 6 Taunt. 14; Waterman *v.* Johnson, 13 Pick. 261. But see as to latent ambiguity, in case of sheriffs' sales, Mason *v.* White, 11 Barb. 174. In Doe *d.* Gord *v.* Needs, 2 M. & W. 129, the law with respect to the admission of extrinsic evidence, in the case of latent ambiguities, is laid down with great clearness by *Parke*, B. The testator in that case devised a house to George Gord, the son of George Gord; another to *George Gord the son of Gord*. He also bequeathed a legacy to George Gord, the son of John Gord. The question was, whether evidence was admissible to show that the testator intended that the house devised to "George Gord, the son of Gord," should go to George, the son of George Gord. *Parke*, B., said: —"If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate

appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain, and without ambiguity,

as a written one, or, adopting the language of Lord Bacon, 'to make that pass without writing which the law appointeth shall not pass but by writing.' But here on the face of the devise no such doubt arises. There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider what would have been the case if there had been no mention in the will of any *other* George Gord, the son of a Gord; on that supposition there is no doubt, upon the authorities, but that evidence of the testator's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed, in order to enable the court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'it shall be holpen by averment whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in Altham's case, 8 Rep. 155 a; 'if A. levies a fine to William, his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine*.' Another case is put in Counden *v.* Clarke, Hob. 32, which is in point; 'if one devise to his son John, where he has two sons of that name,' and the same rule was acted upon in the recent case of Doe *v.* Morgan, 1 C. & M. 235. The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies; and to determine which of the two the testator understood to be signified by the description which he used in the will. . . . . There would have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George, the son of *John* Gord, and George, the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George, the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had; it shows that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known; and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself." Evidence of intention may be admitted, where there are two persons of the same name, father and son, although the son has the addition of *jun'r* to his name. Coit *v.* Starkweather, 8 Conn. 289. See Doe *v.* Westlake, 4 B. & Ald. 57. If in cases of latent ambignity the intent of the parties is not ascertained, the instrument is void for uncertainty. Richardson *v.* Watson, 4 B. & Ad. 787; Cheyney's case, 5 Rep. 68 b. Much will be gained in point of accuracy, it is conceived, by restricting the term *latent ambiguity* to the case where words of description have a double application. Indeed it is so restricted by *Alderson*, B., in Smith *v.* Jeffryes, 15 M. & W. 562. If the term is so restricted, we then have the cases of *latent ambiguities* proper, in which alone evidence of *intention direct* is admissible. All other uncertainties, whether *patent* or *latent*, in the ordinary

for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. *et* J. S., *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. But if it be *ambiguitas latens*, then otherwise it is: as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and, therefore, it shall be holpen by averment, whether of them was that the party intended should pass." (*t*)

The rules of Lord *Bacon* rest entirely upon the principle that the law will not make, nor permit to be made, for parties, a contract other than that which they have made for themselves. They can have no other basis than this; and so far as they carry this principle into effect they are good rules, and no farther. For it is this principle which underlies the whole law of construction, and originates and measures the value of all its rules. Thus, if a contract be intelligible, and evidence shows an uncertainty, not in the contract, but in its subject-matter or its application, other evidence which will remove this uncertainty is admissible. (*u*) But if a con-

sense of those terms, must be removed by the same kind of evidence, namely, by placing the court which is to construe an instrument as nearly as possible in the situation of the author of, or parties to, such instrument. The rule of patent and latent ambiguities, then, falls to the ground, as furnishing a decisive test by which to determine in all cases whether evidence may be admitted to explain a written instrument.

(*t*) Bac. Max. Reg. 23.

(*u*) "For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence." Per *Parke*, B., in Shore *v.* Wilson, 9 Cl. &

tract is not certainly intelligible by itself, it may be said that evidence which makes it so must make a new contract; for one that is intelligible cannot be the same with one that is unintelligible; and therefore the evidence is not admissible. But this argument must not be carried too far, for it is not always applicable without much qualification. What indeed is the meaning of uncertainty? If words of a foreign language are used, the contract is uncertain until they are interpreted; if words which are merely technical, then it is uncertain until experts have given their meaning; if words which are applicable to two or three different things or persons, then it is uncertain until the one thing or person is clearly pointed out. Now, where does the law stop in this endeavor to remove uncertainty? We answer, not until it is found that the contract must be set aside, and another one substituted, before certainty can be attained. In other words, if the contract which the parties have made is incurably uncertain, the law will not, or rather cannot enforce it; and will not, on the pretence of enforcing it, set up a different but valid one in its stead. It will only declare such a supposed contract no con-

Fin. 556. See Guy *v.* Sharp, 1 Myl. & K. 589, 602, per Lord *Brougham;* Doe *v.* Martin, 1 Nev. & Man. 524, per *Parke*, J.; Doe *v.* Hiscocks, 5 M. & W. 367, per Lord *Abinger;* Hildebrand *v.* Fogle, 20 Ohio. 147; Hasbrook *v.* Paddock, 1 Barb. 635; Simpson *v.* Henderson, M. & Malk. 300; Wood *v.* Lee, 5 Monroe, 50, 59; Hitchin *v.* Groom, 5 C. B. 515. "Where there is a gift of the testator's stock, that is ambiguous, it has different meanings when used by a farmer and a merchant. So with a bequest of jewels; if by a nobleman, it would pass all; but if by a jeweller, it would not pass those that he had in his shop. Thus the same expression may vary in meaning according to the circumstances of the testator." Per *Plumer*, M. R., in Colpoys *v.* Colpoys, Jac. 464. See also Kelly *v.* Powlet, Ambl. 605, 610. The remarks of Sir James *Wigram* upon this point, although made with reference to wills, apply equally to all instruments to be construed. "It must always be remembered," says he, "that the words of a testator, like those of every other person, tacitly refer to the circumstances by which at the time of expressing himself he is surrounded. If therefore when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the court, in aid of the construction of the will, refers to those extrinsic collateral circumstances to which it is certain the language of the will refers. It may be true, that, without such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning *from any other source than the page he was reading*, because, in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading." Wigram on Wills, sec. 76.

tract at all; and the parties are left to the mutual rights and obligations which may then exist between them. But on the other hand, the law will not pronounce a contract incurably uncertain, and therefore null, until it has cast upon it all the light to be gathered either from a collation of all the words used, or from all contemporaneous facts which extrinsic testimony establishes. (*v*) If these make the intention and meaning of the parties certain, it may still be an intention which the words cannot be made to express by any fair rendering. In this case also the contract is null, for it is the words and not the intention that must prevail. But if, when the intention is thus ascertained, it is found that the words will fairly bear a construction which makes them express

(*v*) Among the material facts necessary to be known by the court in order that it may be placed as near as may be in the position of the parties to any instrument, is the *knowledge* or *ignorance* of those parties as to certain facts necessarily involved in the application of the instrument to the persons or things described in it. Thus, in Doe *v.* Beynon, 12 Ad. & El. 431, there was a devise to Mary B., with remainder to "her three daughters, *Mary*, *Elizabeth*, and *Ann*." At the date of the will, Mary B. had two legitimate daughters, Mary and Ann, living, and one illegitimate named Elizabeth. It was *held*, that evidence was admissable to show that Mary B. formerly had a legitimate daughter named Elizabeth, who died some years before the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter. See also Powell *v.* Biddle, 2 Dall. 70; Goodinge *v.* Goodinge, 1 Ves. 231; Careless *v.* Careless, 19 Ves. 601; Scanlan *v.* Wright, 13 Pick. 523; Brewster *v.* McCall's devisees, 15 Conn. 274, 296. — So where the question is one purely of intention, the *belief* of the *author* of an instrument, as to facts necessarily involved in it, may have an important bearing upon its construction. A testator devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., both of which were in the possession of T. H., but at different rents. On a question being raised which of these two farms the testator intended to give to T. R., *held*, that the devise must be taken to have been made to T. R. for his personal advantage and not upon trust; and if therefore it could be ascertained that one of the farms was subject to a trust, or that the testator *supposed* it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. Lord *St. Leonards* said: — "The only question which is absolutely necessary to be decided is this, not whether the testator really held those estates, or one of them, on any valid trusts, but rather what he considered and understood to be his interest, that is, whether he supposed that he held them, or one of them, on any trust, or treated, or intended to treat, or to have them or one of them treated, as if so held in trust. If he supposed that he held one of them in trust, or treated it as if so held and intended that it should be considered and treated as so held, and if it does not appear that he held, or supposed that he held, the other of them on any trust, it seems to me that the one which he supposed to be held on any trust, or treated as if so held, cannot be regarded as intended to be the subject of the devise to Mr. Robinson, and consequently the other estate may be deemed to be the one referred to in that devise." Blundell *v.* Gladstone, 12 Eng. Law & Eq. 52. See also Quincey *v.* Quincey, 11 Jurist. 111; Conolly *v.* Pardon, 1 Paige, 291; Baker *v.* Baker, 2 Ves. 167.

this intention, then the words will be so construed, and the contract, in this sense or with this interpretation, will be enforced, as the contract which the parties have made.

The distinction and the rules of Lord *Bacon* are therefore less regarded of late than they were formerly. (*w*) They are intended to enable the court to distinguish between cases of curable and those of incurable uncertainty; to carry the aid of evidence as far as it can go without making for the parties what they did not make for themselves, and to stop there. And it is found that it is sometimes of doubtful utility to refer to these rules in the endeavor to ascertain the meaning of a contract, rather than to the simpler rule, that evidence may explain but cannot contradict written language. This last rule limits all explanation to cases of uncertainty, because where the meaning is plain and unquestionable, another meaning is not that which the parties have agreed to express. Thus, if a blank be left in an instrument or a word or phrase of importance omitted by mistake, the omission may be supplied, if the instrument contains the means of supplying it with certainty, otherwise not, because the parties in such a case have not made the instrument; and the law would make it, and not the parties, if it undertook to supply by presumption an omitted word necessary to its legal existence. And if it permitted this to be supplied by parol testimony, it would be this testimony, and not a written instrument which proved the property or determined the rights and obligation of the parties. (*x*) But this rule permits all fair and reasonable explanation of actual uncertainty. Thus, if a guaranty be given, beginning, "In consideration of your having this day advanced" money, &c., which guaranty is invalid if in fact for a past or executed consideration, evidence should be received to show that in point of fact the advancing of the money and the giving of the guaranty were simultaneous acts. (*y*)

(*w*) See *ante*, p. 70, n. (*s*).

(*x*) Miller *v.* Travers, 8 Bing. 244; Saunderson *v.* Piper, 5 Bing. N. C. 425; Baylis *v.* Attorney-General, 2 Atk. 239; Castledon *v.* Turner, 3 Atk. 257; Hunt *v.* Hort, 3 Bro. C. C. 311.

(*y*) Goldshede *v.* Swan, 1 Exch. 154. In this case, *Pigott*, of counsel with the

It is not easy to lay down rules which will assist in determining these difficult questions, and not be themselves open to much question. But we should express our own views on this subject by the following propositions.

If an instrument is intelligible and certain when its words are taken in their common or natural sense, all its words shall be so taken, unless something in the instrument itself gives to them, distinctly, a peculiar meaning, and with this meaning the instrument is intelligible and certain; and in that case this peculiar meaning shall be taken as the meaning of the parties.

If the meaning of the instrument, by itself, is intelligible and certain, extrinsic evidence is admissible to identify its subjects or its objects, or to explain its recitals or its promises, so far, and only so far, as this can be done without any contradiction of, or any departure from, the meaning which is given by a fair and rational interpretation of the words actually used.

If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony, (*z*) and this intention will be taken

defendant, insisted upon the rule that parol evidence is not admissible to vary the terms of a written instrument. But *Parke*, B., interrupting him, said: — "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, where that instrument is ambiguous, in such a manner as not to contradict it, you are at liberty to do so." And the other judges use similar language. See also Butcher *v.* Steuart, 11 M. & W. 857, where, "in consideration of your having released," was held to have a prospective and conditional meaning, by the help of extrinsic evidence. And see Colbourn *v.* Dawson, 4 Eng. Law & Eq. 378; Haigh *v.* Brooks, 10 Ad. & El. 309.

(*z*) See *ante*, p. 70, n. (*s*). This intention, of course, is to be ascertained, in all cases, except that of *latent ambiguity* proper, by a development of the *circumstances* under which the instrument was made. It cannot be ascertained by bringing forward proof of declarations or conversations which took place at the time the instrument was made, or before, or afterwards. After considerable confusion caused by some anomalous early cases, the law upon this point, especially in reference to wills, is clearly settled in England. In Beaumont *v.* Fell, 2 P. Wms. 140, it was permitted to be shown that Gertrude Yardley was the person intended to be designated by a testator by the name of Catherine Earnley, [see the case stated *ante*, p. 62, n. (*v*). In Thomas *v.* Thomas, 6 T. R. 671, there was a devise as follows: — "Item. I devise to my granddaughter, Mary Thomas, of Llechloyd, in Merthyr parish, &c." The testator had a granddaughter of the name of Elinor Evans, living at the place mentioned in the will, and a great-granddaughter, Mary Thomas, who lived at a place some miles distant from Merthyr parish. It was *held* by Lord *Kenyon*, that evidence of declarations made by the testator, at the time

as the meaning of the parties expressed in the instrument, if it be a meaning which *may be* distinctly derived from a

the will was made, would have been admissible to show whom the testator meant by the inaccurate description. See also Hampshire *v.* Pierce, 2 Ves. 216; Strode *v.* Russel, 2 Vern. 623; Price *v.* Page, 4 Vesey, 680; Still *v.* Hoste, 6 Madd. 192; Hodgson *v.* Hodgson, 2 Vern. 593. So far as these cases sanction the doctrine that evidence of *intention* is admissible in cases not falling under the rule as to *latent ambiguity*, as defined *ante*, p. 70, n. (*s*), they are overruled by the cases of Miller *v.* Travers, 8 Bing. 244, and Doe *d.* Hiscocks *v.* Hiscocks, 5 M. & W. 363. In Miller *v.* Travers, there was a devise of all the testator's estates in the county of Limerick and city of Limerick. At the time of making the will, the testator had no estate in the county of Limerick. He had a small estate in the city of Limerick, inadequate to meet the charges in the will, and considerable estates situate in the county of Clare. It was *held*, that it could not be shown by parol evidence that the words "county of Limerick" were inserted by mistake, instead of the words "county of Clare;" and that the testator intended to devise his estate in the county of Clare. See the very able review of the cases by *Tindal*, C. J. In Doe *d.* Hiscocks *v.* Hiscocks, a testator devised lands to his son John Hiscocks for life; and from his decease, to his grandson *John Hiscocks, eldest son* of the said John Hiscocks. At the time of making the will, the testator's son John Hiscocks had been twice married; by his first wife he had one son, *Simon;* by his second wife an eldest son, *John*, and other younger children, sons and daughters. *Held*, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will. Lord *Abinger*, after stating the facts, and noticing the question raised, said: — "It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again, — the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances

fair and rational interpretation of the words actually used. But if it be incompatible with such interpretation, the instrument will then be void for uncertainty, or incurable inaccuracy.

A contract may be enforced in its plain and natural, or in its legal meaning, although evidence be offered tending to show that the intention of the parties differed absolutely from their language, unless the transaction be void from fraud, illegality, incapacity, or in some similar way.

Lastly, no contract will be enforced, as a contract, if it have no plain and natural or legal meaning, by itself; and if admissible extrinsic evidence can only show that the intention of the parties was one which their words do not express. But the supposed contract being set aside for such reasons as these, the parties will be remitted to their original rights and obligations.

admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons, (each answering the words in the will,) the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord *Bacon* calls "an equivocation," *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." See also Shore *v.* Wilson, 9 Cl. & Fin. 355, S. C. *nom.* Attorney-General *v.* Shore, 11 Sim. 592, where this whole matter is very fully discussed. For the present state of the law upon the various points discussed in this last section, the profession are very greatly indebted to the admirable little treatise by Sir James *Wigram* on the Interpretation of Wills.

CHAPTER II.

THE LAW OF PLACE.

Sect. I. — *Preliminary Remarks.*

If one or both parties to a contract entered into it away from their home, or if a contract or questions dependent upon it come into litigation before a foreign tribunal, the construction of the contract, the rights that it gives, the obligations that it imposes, and the remedies which either party may have may depend upon the law of the place where the contract was made, or the law of the domicil of the parties, or the law of the place where the thing to which the contract refers is situated, or the law of the tribunal before which the questions are litigated; or, to use the Latin phrases generally employed, the *lex loci contractus*, the *lex domicilii*, the *lex loci rei sitæ*, and the *lex fori*.

The common law has left many of these questions unsettled; but the immense immigration into this country, the great and growing intercourse between it and foreign nations, and the extreme facility and frequency of foreign travel, and, more than this, the fact that our own nation is composed of thirty-one independent sovereignties, all combine to give to questions of this kind peculiar importance, and, on some points, peculiar difficulty. It will not be possible to exhaust the consideration of these topics within the space which can, in this work, be given to them. But an attempt will be made to present the leading principles which must determine all these questions. To few of them is there a precise and certain answer given by the common law; and some of them have not yet passed into adjudication. By writers on the civil and continental law of Europe, they have been, perhaps all of them, very fully considered; but with

such a diversity, and irreconcilable contrariety of conclusion, that we shall confine ourselves, as far as possible, to the common-law authorities. (*a*)

SECTION II.

GENERAL PRINCIPLES.

The first principle we state is this. Laws have no force by their own proper vigor, beyond the territory of the state by which they are made; excepting, for some purposes, the high seas, or lands over which no state claims jurisdiction. Without this limit, they have no sanction; obedience cannot be compelled, nor disobedience punished; and no contiguity of border, and no difference of magnitude or power between two independent states can affect this rule. For if the state, a law of which is broken, sends its officers into another, and there by force or intimidation acts in reference to this breach as it might act at home, such act is wholly illegal; and if it thus acts with the consent of the foreign state, within whose dominion it goes by its officers, it is this consent only which legalizes its acts. (*b*)

(*a*) Mr. Justice *Story's* large work on the Conflict of Laws is in a great measure composed of these conflicting statements; and in his closing paragraph he says: — "It will occur to the learned reader, upon a general survey of the subject, that many questions are still left in a distressing state of uncertainty, as to the true principles which ought to regulate and decide them. Different nations entertain different doctrines and different usages in regard to them. The jurists of different countries hold opinions opposite to each other, as to some of the fundamental principles which ought to have a universal operation, and the jurists of the same nation are sometimes as ill agreed among themselves." And in Saul *v.* His Creditors, 17 Mart. 571, *Porter*, J., says: — "The only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different states. Our former experience had taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us that the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought or written upon it."

(*b*) Le Louis, 2 Dods. 210; Blanchard *v.* Russell, 13 Mass. 4; Bank of Augusta *v.* Earle, 13 Pet. 584.

In the next place, all laws duly made and published by any state bind all persons and things within that state. (*c*) This is a general, and perhaps universal rule; for the few seeming exceptions to it are not so in fact. A stranger is bound to the state wherein he resides only by a local and limited allegiance; but it is one which is sufficient to subject him to all the laws of that state, excepting so far as they relate to duties which only citizens can perform. For, as every state has the right, in law, of excluding whom it will, so it may put what terms and conditions it will upon the admission of foreigners. All contracts, therefore, which are construed within the state in which they are made, must be construed according to the law of that state. The same thing is true, in general, when contracts are construed in a place other than that in which they are made; but this rule, and the exceptions to it, will be considered presently.

In the next place, every state may, by its own laws, bind all its own subjects or citizens, wherever they may be, with all the obligations which the home tribunals can enforce. Farther than this, if such laws are made, they must needs be inoperative, as they cannot be enforced beyond the jurisdiction of the home tribunals, except with the consent and by the action of the foreign state.

Lastly, it may now be said, on good authority, that foreign laws may have a qualified force, or some effect, within a state, either by the comity of nations, which is one of the fruits of modern civilization, or by special agreement, as by treaty, or by constitutional requirements, as in the case of our own country, of which the constitution requires that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." But in none of these cases do laws acquire, strictly speaking, the force of laws, within a sovereignty which is

(*c*) "The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the laws of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives." Per Lord *Mansfield*, in Hall *v.* Campbell, Cowp. 208. See Ruding *v.* Smith, 2 Hagg. Consist. Rep. 383.

foreign to that in which they were enacted; nor could this be the case without a confusion of sovereignties. But the effect of such comity, aided in some instances by special agreements, or constitutional requirements, may be stated to be, that the laws of civilized nations are permitted to have some operation in foreign states, so far as they in no degree conflict with the powers or the rights of such foreign states, or with the operation of their laws. (*d*)

The first and most general principle as to the *validity* of a contract, rests upon obvious reasons, and certain expediency, if indeed we may not say that it is founded in the necessities of national intercourse; it is, that a contract which is valid where it is made is to be held valid everywhere. And on the other hand, if void or illegal by the law of the place where made, it is void everywhere. (*e*)

(*d*) *Story* quotes from *Huberus* a very precise statement of this rule. "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." Confl. of Laws, § 29, n. 3.

(*e*) Trimbey *v.* Vignier, 1 Bing. N. C. 151; De Sobry *v.* De Laistre, 2 H. & Johns. 191; Willings *v.* Consequa, Pet. C. C. 317; Pearsall *v.* Dwight, 2 Mass. 88; Smith *v.* Mead, 3 Conn. 253; Medbury *v.* Hopkins, 3 Conn. 472; Houghton *v.* Page, 2 N. H. 42; Dyer *v.* Hunt, 5 N. H. 401; Whiston *v.* Stodder, 8 Mart. 95; Andrews *v.* His Creditors, 11 Louis. 464; Bank of United States *v.* Donally, 8 Pet. 361; Andrews *v.* Pond, 13 Id. 65; Wilcox *v.* Hunt, Id. 378; Van Reimsdyk *v.* Kane, 1 Gall. 371; Touro *v.* Cassin, 1 N. & McCord, 173; Robinson *v.* Bland, 2 Burr. 1077; Burrows *v.* Jemino, 2 Str. 733; La Jeune Eugenie, 2 Mason, 459; Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Campb. 166. These two rules, or rather this one rule, is generally asserted as broadly as we have stated it in the text; and yet there are cases and *dicta* of weight that conflict with it. In James *v.* Catherwood, 3 Dowl. & Ry. 190, where on assumpsit for money lent in France, receipts were offered in evidence not stamped as the laws of France required to make them available there, they were received in England. It is true, that on the motion for a new trial, it is put on the ground that it is perfectly well settled that an English court will not take notice of foreign *revenue laws*. This is undoubtedly established. See Boucher *v.* Lawson, Cas. Temp. Hardw. 85, 194; Holman *v.* Johnson, Cowp. 341; Biggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 T. R. 466; Planché *v.* Fletcher, 1 Doug. 251; Ludlow *v.* Van Rensselaer, 1 Johns. 94. In Wynne *v.* Jackson, 2 Russell, 351, it was *held* that a holder might recover in an English court on a bill drawn in France on a French stamp, though in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France. Even if the contracts in these cases were to be considered as violating only revenue laws, still, could a contract made in France, between Frenchmen there, to smuggle goods against the law of France, be held good in England or America? Not on any general principles that we are aware of; and certainly not because a contract made in England to smuggle into France would be held good in England; for the cases are entirely distinct. — So, if contracts are made only orally, where by law they should be in writing, they cannot be enforced elsewhere where writing is not required. And if made orally where

The general rule as to the construction of contracts is, that if they relate to moveables, which have no place, no *sequelam*, in the language of the civil law, for "*mobilia inhærent ossibus domini*," they are to be construed according to the law of the place where they are made, or the *lex loci contractus*; (*f*) and if they relate to immoveables, or what the common law calls real property, they are to be construed according to the law of the place where the property is situated, or the *lex loci rei sitæ*. (*g*) This we have said to be

writing is not required, they can be enforced in other countries where such contracts should be in writing. Vidal *v.* Thompson, 11 Mart. 23; Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Campb. 166.

(*f*) Thorne *v.* Watkins, 2 Ves. 35; Holmes *v.* Remsen, 4 Johns. Ch. 487; Harvey *v.* Richards, 1 Mason, 412; Bruce *v.* Bruce, 2 B. & P. 229, n. (*a*); Somerville *v.* Somerville, 5 Ves. 750. In the case *In re* Ewin, 1 C. & Jer. 156, *Bayley*, B., says: — "It is clear, from the authority of Bruce *v.* Bruce, 2 Bos. & Pul. 229, and the case of Somerville *v.* Somerville, 5 Ves. 750, that the rule is that personal property follows the person, and it is not in any respect to be regulated by the *situs;* and if, in any instances, the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly done. Wherever the domicil of the proprietor is, there the property is to be considered as situate; and, in the case of Somerville *v.* Somerville, which was a case in which there was stock in the funds of this country, which were at least as far local as any of the stocks mentioned in this case are local, there was a question whether the succession to that property should be regulated by the English or by the Scotch rules of succession. The Master of the Rolls was of opinion that the proper domicil of the party was in Scotland. And having ascertained that, the conclusion which he drew was, that the property in the English funds was to be regulated by the Scotch mode of succession; and if the executor had, as he no doubt would have, the power of reducing the property into his own possession, and putting the amount into his own pocket, it would be distributed by the law of the country in which the party was domiciled. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party to whom that property belongs; and there are authorities that ascertain this point, which bears by analogy on this case, namely, that if a trader in England becomes bankrupt, having that which is personal property, debts, or other personal property, due to him abroad, the assignment under the commission of bankrupt operates upon the property, and effectually transfers it, at least as against all those persons who owe obedience to these bankrupt laws, the subjects of this country." In Milne *v.* Moreton, 6 Binn. 353, *Tilghman*, C. J., states the rule with some qualification. He says: — "This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts) it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience."

(*g*) Upon this general rule the common law and civil law agree; and the American authorities are explicit. See Warrender *v.* Warrender, 9 Bligh, 127; Dundas *v.* Dundas, 2 Dow & Clarke, 349; Coppin *v.* Coppin, 2 P. Wms. 291; United States *v.* Crosby, 7 Cranch, 115; Cutter *v.* Davenport, 1 Pick. 81; Hosford *v.* Nichols, 1 Paige, 220; Wills *v.* Cowper, 2 Hamm. 312; Kerr *v.* Moon, 9 Wheat. 565; McCormick *v.* Sullivant, 10 Id. 192; Darby *v.* Mayer, Id. 465. It is a conclusion from this rule, as will be seen from the preceding authorities, that the title to land can be

the general rule; and if we do not call it a universal rule, it is because we are not quite prepared to say that none of the apparent exceptions to the rule are real.

Thus, there is a question involved in the construction of every contract, or rather, a question prior to its construction; namely, whether the parties to the contract had the power to make it. This is the question of the capacity of persons; and it is decided by what civilians term personal laws. And the general rule is said to be that a personal capacity or incapacity, created by a law of the state wherein a party has his domicil, follows him wherever he may go. (*h*) But if this be the rule of law, it is not one of universal application, and in some cases needs important qualification. For this rule as to capacity may come into direct conflict with the general rule, that all personal contracts are to be construed and applied according to the law of the place where they were made, and when this conflict exists, the important question arises, which rule shall prevail.

SECTION III.

CAPACITY OF PARTIES.

It must be remembered that the *rule* is that persons have capacity to contract; and the *exception* is, their want of ca-

given or taken, acquired or lost, only in conformity with all the requirements of the law of the place where the real estate is situated. Some question may exist as to what comes under this rule as to immoveables. In Robinson *v.* Bland, 2 Burr. 1079, Lord *Mansfield* applies it to public stock. And Mr. Justice *Story*, Confl. of Laws, § 383, says: — "The same rule may properly apply to all other local stock or funds, although of a personal nature, or so made by the local law, such as bank stock, insurance stock, turnpike, canal, and bridge shares, and other incorporeal property, owing its existence to, or regulated by, peculiar local laws. No positive transfer can be made of such property, except in the manner prescribed by the local regulations."

(*h*) This rule is laid down by most of the great multitude of writers, who may be cited as authorities of greater or less weight, on the law of Continental Europe; but it does not seem to have been asserted, in so many words, by the courts of common law. In Ruding *v.* Smith, 2 Hagg. Consist Rep. 391, Lord *Stowell* discusses it somewhat. And it seems to be implied in many of the cases to which we shall refer, in the farther consideration of the question of capacity.

pacity. This exception, therefore must be made out. And capacity will be held not only when there is no evidence and no rule against it, but when the evidence, or the rules, or the argument, leave it in doubt.

Incapacities are of two kinds; those which may be called natural incapacities, as absolute duress, insanity, or imbecility; and those which may be called artificial, because arising by force of local laws, from marriage, or slavery, or such other causes as are made grounds of incapacity only by positive laws, which vary in different states. And then there is a third kind between these two, or composed of these two, when a natural incapacity, as that of an *actual* infant, passes by imperceptible degrees into the artificial incapacity of a *legal* infant of twenty years of age. In regard to the first class, it is true that wherever the incapacitated person goes he carries his incapacity with him; but this is perhaps not because his incapacity was created by a law of the home from which he came, for it was only recognized by that law; and being recognized by every other law, he finds himself under the same incapacity in every state, because he finds a similar law everywhere in force. For this law is one which may well be called a law of nature; that is, a law enacted by the supreme creator of, and lawgiver for, human nature, and as wide in its scope and operation as that nature.

When we come to the incapacities of the second kind, that is, to artificial incapacities, the law is not so certain. Upon the law of the capacity of the person, and the law of the place of the contract, on either or on both, the law of construction of contracts as to place, would seem to be founded. Nor is there any difficulty in applying either alone, or both if they are coincident; but if they are both applicable, but would lead to directly opposite results, this collision gives rise to questions which it would be impossible to settle absolutely, even on the authority of civilians; because there is an irreconcilable difference among them. But, judging as well as we may, from the general principles which belong to this subject, we should prefer the opinion of those who hold, that when the two rules above mentioned come into conflict, that which gives controlling power to the

law of the place of the contract should prevail. We might admit a distinction sometimes intimated, and say that a question which related only to the state and condition of a person, without reference to other parties, would generally be construed by the law of his domicil, wherever he might be. But if one away from his domicil disposes of his movable property, or enters into personal contracts, we cannot but think that the law of the place in which he does these acts would be applied to them. (*i*)

(*i*) On this point, as on most of the questions of the *lex loci*, the opinions of civilians stand opposed to each other irreconcilably; the great majority, both in number and weight, assert that the law of the domicil determines everywhere the capacity of the party; but they differ very much in the application of the rule; and some of high authority hold a different doctrine. But on this subject we must refer to such works as Livermore's Dissertations, Story's Conflict of Laws, Burge's Commentaries on Colonial and Foreign Laws, and Henry on Foreign Law, in which these authorities are cited and compared; and the student who would push his inquiries farther in this direction will be guided to the original authors, and referred to the places in which these questions are considered. The whole discussion of this question, among civilians, turns upon the exact distinction between real and personal statutes; a distinction wholly unknown to the common law. And indeed they understand by "statute" not what we do, but any thing which has the force of law, whatever be its origin and authorization. *Kent* says that while the continental jurists generally adopt the law of the domicil, (supposing it to come in conflict with the law of the place of the contract,) the English common law adopts the *lex loci contractus*. See 2 Kent's Com. 459, n. (*b*). We have not, however, been able to find direct and conclusive authority for this. In Male *v.* Roberts, 3 Esp. 163, in which the plaintiff sought to recover money paid for the defendant in Scotland, and the defence was infancy, Lord *Eldon* said: — "It appears from the evidence in this cause that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessaries I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose must govern the contract; and what that law is should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is without evidence." It would seem in this case, though not distinctly stated, that both parties were domiciled in England. In Saul *v.* His Creditors, 17 Mart. 569, 590, which it might be supposed would be governed rather by the rules of the civil law, the court say: — "A personal statute is that which follows and governs the party subject to it wherever he goes. The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove. But it is subject to a real statute of the place where the person subject to the personal should fix himself, or where the property on which the contest arises may be situated." Afterwards, p. 597, in illustration of these rules, the court say what we should suppose to mean simply that the law of the place of the contract overcomes the law of the domicil as to capacity. "Now supposing the case of our law fixing the age of majority at

Thus, if a woman of the age of nineteen, whose domicil was in Massachusetts, having gone into Vermont, (where women are so far adult at eighteen that they may bind themselves at that age for things not necessary,) there bought non-necessaries, and gave her note for the price, and while she was there the note was put in suit against her, we do not think that she could interpose the law of Massachusetts in her defence. And if a woman of that age, whose domicil was in Vermont, came into Massachusetts, and there bought non-necessaries, and was sued for the price, we think she could interpose the defence of infancy. If, in the first case, the woman returned to Massachusetts, and the note was sent after her and put in suit there, it might admit of more question whether the law of the forum would now prevail over the law of the place of the contract, and constitute a good defence; or if in the second case the woman returned to Vermont, and suit was brought against her there, it might admit of more question, whether the law of the forum would now prevail over the law of the place of the contract, and enforce the contract, negativing this defence. But this doubt would be in fact a doubt whether, when the law of the domicil and the law of the place of the contract conflict, the law of the forum may not come in, and decide in favor of the law of the domicil, if that be also the place of the forum, or in favor of the law of the place of the contract, if that be the place of the forum. But we are not satisfied that such would be the rule.

twenty-five, and the country in which a man was born and lived, previous to his coming here, placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe would be true, that a contract made here at any time between the two periods already mentioned would bind him. But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this State, and entered into contracts; — would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of their own state? Most assuredly we would not. 16 Martin, 193. Take another case. By the laws of this country slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts; — would their courts sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know they would not."

There is another principle which may have a bearing upon this question; for it seems reasonable at least to say that a contract, void or voidable at its inception, cannot be made valid against the will of the party having the right of avoidance, by a mere change of his place, nor can a contract valid and enforceable when and where entered into be made invalid in this way. Any woman over eighteen, buying on credit non-necessaries in Vermont, makes a contract which is valid then and there, and any woman of that age making such a contract in Massachusetts makes one which is not valid then and there; and these contracts must remain, the first valid and the second invalid, wherever it may be sought to enforce them, unless, in the first case, a foreign law is admitted to destroy the validity of the contract, and in the second case, comes in to give the contract validity and force; and we think a foreign law can do neither of these things.

By the second of the general principles which we presented early in this chapter, the laws of every state have a binding force over all persons and things within its dominion; and contracts are among the things which it thus controls. It must be true, therefore, that these laws govern and determine all contracts made within their territorial scope, or, in other words, that every contract must be construed according to the law of the place of the contract, unless we are at liberty to say one of two things; either that the foreign law affected the contract, and controlled the home law at the time the contract was made, or else that it had this effect subsequently. Now, to say that the foreign law thus operated upon the contract at its inception, would be to say that a foreign law entered into a foreign and independent state with a power of its own, and there by this power resisted and controlled the home law, and importantly affected the rights of parties who made the contract under the home laws. And this would be giving to this foreign law a power far beyond what it could derive from any principle which can be admitted to belong to the comity of nations. (*j*) On

(*j*) In Saul *v.* His Creditors, 17 Mart. 595, the court say, after quoting from Chancellor *D'Agusseau*: — "If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt, for if any thing be more remarkable in him than his ge-

the other hand, if we admit that the contract when made was valid only according to the laws of the country where it was made, but say that afterwards another law, the law of the domicil of a party, or of the forum before which the question comes, varies the contract in important respects, we say no less than that a law which the parties in making their contract could not be supposed to contemplate, and were not affected by, afterwards made a new contract for them, or established or discharged relations or obligations between them, against or without their will and consent.

Upon the whole we are of opinion that the rule which requires that every contract should be construed according to the law of the place where it was made, is very nearly universal. The exceptions we should admit are, principally, those founded upon the possible fact that the law of a state might oppose or vary the law of *natural* capacity or incapacity, or might permit a contract which could be performed only by acts in another country which would be distinctly and positively prohibited by the law of that country. And even in such cases it might more properly be said, that the contract should be construed according to the law of the place where it was made, but that whenever such construction could make it illegal, it would be for that reason void. But the illegality here meant is not that of an infant's contract for non-necessaries, or the contract of a married woman. When it is said that he or she cannot do this, it is meant only that the law per-

nius and his knowledge it is the extraordinary fulness and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far. To define and fix that which cannot in the nature of things be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances which cannot be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens: that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced — the particular nature of her legislation — her policy, and the character of her institutions. That in the conflict of laws, it must be often a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides will prefer the law of its own country to that of the stranger."

mits a party making such a contract to treat it as void; not that the law prohibits such parties from making these contracts.

All of these questions are sometimes much complicated with other questions, as where the domicil of the party is, or where was the place in which the contract was made; and become in this way much more difficult.

SECTION IV

DOMICIL.

Every person has, in law, a home, or domicil; (*k*) and every domicil which one has, whether the original domicil or a subsequent one, continues until a new one is acquired, (*l*) and when a new one is acquired, the former domicil ceases, (*m*) because no person can have more than one domicil at the same time. (*n*) One's domicil, or home, is in the country in which he permanently resides. To the idea of domicil, or home, two elements belong; one, that of act, the other, that of intent. The very beautiful definition of the Roman law cannot be literally and adequately translated into English. "It is not doubted that individuals have a home in that place where each one has established his hearth and the sum of his possessions and his fortunes; (*larem rerumque ac fortunarum suarum summam constituit,*) whence he will not depart if nothing calls him away; whence if he has departed he seems to be a wanderer, and if he returns he ceases to wander." (*o*)

The questions of domicil sometimes present much difficulty in determining what is the measure, or what is the evidence of this residence in fact, or in intent. Both are necessary to constitute a domicil. Both are implied in favor of

(*k*) Crawford *v.* Wilson, 4 Barb. 504.
(*l*) Id. (*m*) Id.
(*n*) Id.; Abington *v.* North Bridgewater, 23 Pick. 170; Thorndike *v.* The City of Boston, 1 Metc. 242.
(*o*) Code, Lib. 10, tit. 39, 7.

the home which one has by birth and parentage, and subsequent inhabitancy. The dwelling in a place, or even being there, may constitute *primâ facie* evidence of domicil; but it is evidence which may be rebutted. (*p*) And it is quite certain that no definite period of time, no exact manner of residence, no precise declarations or specific acts, are necessary to ascertain domicil, or perhaps suffice to determine domicil; although the Supreme Court of the United States have intimated that an exercise of the right of suffrage would be the highest evidence; and perhaps it would be conclusive *against* the party. (*q*)

When a domicil is in any way acquired, it may be changed, by a change both in fact and in intent, but not by either change alone; the change in fact not being enough without intent, (*r*) nor the change in intent without the change in fact. (*s*) One who goes abroad *animo revertendi*, does not change his domicil, because only the fact of residence is changed, and not the intent. But if he remains very long abroad, and in one place, the intent may be inferred from the fact. And this inference may be made against the express declarations and assertions of the person. (*t*) For the fact and the intent together determine the domicil, and not the language; nor is this important except as evidence of intent. If therefore one insists upon his purpose of return, and the preservation of his domicil, but the facts are such as to lead to and justify the belief that this expressed intention of return is but a false pretence, made for the sake of preserving as long as he can the rights of domicil, while in fact he means to abide where he now is, the intent will

(*p*) Crawford *v.* Wilson, 4 Barb. 504, 519; Bruce *v.* Bruce, 2 B. & P. 229, n. (*a*); Sears *v.* The City of Boston, 1 Metc. 250.

(*q*) Shelton *v.* Tiffin, 6 How. 185. In this case the court say: — "On a change of domicil from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient."

(*r*) Bradley *v.* Lowry, 1 Speers's Eq. 1; Granby *v.* Amherst, 7 Mass. 1; Lincoln *v.* Hapgood, 11 Mass. 350; Harvard College *v.* Gore, 5 Pick. 370; Cadwalader *v.* Howell, 3 Harr. 138; Wilton *v.* Falmouth, 15 Maine, 479.

(*s*) The Attorney-General *v.* Dunn, 6 M. & W. 511; Hallowell *v.* Saco, 5 Greenl. 143; The State *v.* Hallett, 8 Ala. 159; Williams *v.* Whiting, 11 Mass. 424.

(*t*) See *supra*, n. (*q*).

govern, and the change of domicil will be complete. It seems to be agreed that "residence" and "inhabitancy" mean the same thing; (*u*) but whether they both mean the same thing as "domicil" is not so clear. (*v*) It is, however, rather a dispute about the meaning and use of words, than a question of principle; for all admit that one may dwell for a considerable time, and even regularly during a large part of the year, in one place, or even in one State, and yet have his domicil in another. (*w*) If one resides in Boston five months in the twelve, including the day on which residency determines taxation, and the other seven months at his house in the country, he will be taxed in Boston, and may vote there, and his domicil is there. (*x*)

(*u*) Roosevelt *v.* Kellogg, 20 Johns. 208; In the matter of Wrigley, 4 Wend. 602, 8 Id. 134.

(*v*) See Jefferson *v.* Washington, 19 Maine, 293; In the matter of Thompson, 1 Wend. 45; Frost *v.* Brisbin, 19 Wend. 11; Thorndike *v.* The City of Boston, 1 Met. 245; McDaniel *v.* King, 5 Cush. 473; Cadwalader *v.* Howell, 3 Harr. 144; Crawford *v.* Wilson, 4 Barb. 522. See also cases cited in preceding note. In Crawford *v.* Wilson, 4 Barb. 522, the court put soldiers and seamen on the same footing with foreign ministers in respect to domicil. "The actual residence is not always the legal residence or inhabitancy of a man. A foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence or inhabitancy, and domicil, are in his own country. His residence at the foreign court is only a temporary residence. He is there for a particular purpose. So soldiers and seamen may be legal residents and inhabitants of a place, although they may have been absent therefrom for years. They do not lose their residence or domicil by following their profession." So in Thorndike *v.* The City of Boston, 1 Met. 242, the court say: — "If a seaman without family or property sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin." See also Sears *v.* The City of Boston, 1 Met. 250.

(*w*) Frost *v.* Brisbin, 19 Wend. 11.

(*x*) This is the established rule and common practice in Massachusetts, as to the right of taxing one not actually a resident. It is provided by statute that personal estate shall be assessed to the owner in the town where he shall be an *inhabitant* on the first day of May. Rev. Stat. ch. 7, sect. 9. It is held that *inhabitancy* under this statute means substantially the same thing as *domicil*. Thorndike *v.* The City of Boston, 1 Metc. 242. In this case a citizen of Boston, who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring, at the time of his departure, that he intended to reside abroad, and that if he should return to the United States he should not live in Boston. He resided in Edinburgh and the vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavored to engage an American to enter his family for two years, as instructor of his children. Before he left Boston he made a contract for the sale of his mansion-house and furniture there, but shortly afterwards procured said contract to be annulled, (assigning as his reason therefor, that in case of his death in Europe, his wife might

A woman marrying takes her husband's domicil, and

wish to return to Boston,) and let his house and furniture to a tenant. *Held*, that he had changed his domicil, and was not liable to taxation as an inhabitant of Boston in 1837. *Shaw*, C. J., said: — "The questions of residence, inhabitancy, or domicil, — for although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence, — are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts, tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin. . . . . The actual change of one's residence, with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicil, and, unless controlled by other circumstances, is decisive. It was for the jury to determine whether there were any circumstances sufficient to control such conclusion. If the plaintiff had left Boston, and actually taken up a residence, with his family, in Scotland, without any intention of returning, thereby assuming that country as his definite abode and place of residence until some new intention had been formed or resolution taken, he had ceased to be an inhabitant of Boston, liable to taxation for his personal property." In Sears *v.* The City of Boston, 1 Metc. 250, a native inhabitant of Boston, intending to reside in France, with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. *Held*, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property. *Shaw*, C. J., said: "Actual residence, that is, personal presence in a place, is one circumstance to determine the domicil, or the fact of being an inhabitant; but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicil, or whether he has ceased to be an inhabitant of one place, and become an inhabitant of another, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplish-

changes it with him. (*y*) A minor child has the domicil of his father, (*z*) or of his mother if she survive his father; and the surviving parent, with whom a child lives, by changing his or her own domicil in good faith, changes that of the child. (*a*) And even a guardian has the same power. (*b*)

SECTION V.

THE PLACE OF THE CONTRACT.

The rules of law in respect to domicil are quite well settled, and when difficult questions occur, they are usually questions of fact. But the law as to what shall be deemed the place of the contract seems not to be quite well settled. A contract is made when both parties agree to it, and not before; if it be an oral contract, it is made when the offer of one party is distinctly accepted by the other; and if it be made by letter, then it is made when the party receiving the proposition puts into the mail his answer accepting it, or does an equivalent act. If the contract is in writing, it is made when all the parties have executed it; and therefore is not made until the latest party has put to it his name or seal, or both, as may be requisite. (*c*) Suppose, however, that the contract is made in one place, but is to be performed in another; then, in general, although perhaps not always, and for

ed; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." The learned Chief Justice then remarks that the facts in the present case are considered by the court as indicating only a casual and temporary departure of the plaintiff from his place of permanent residence; that Paris was his place of temporary and not of permanent abode; and that he did not relinquish his domicil, or cease to be an inhabitant of Boston. The case is distinguished from the case of Thorndike *v.* City of Boston, by the different intent of the parties upon their departure.

(*y*) Warrender *v.* Warrender, 9 Bligh, 89, 103, 104.

(*z*) Guier *v.* O'Daniel, 1 Binn. 349, n. *a*.

(*a*) Cumner *v.* Milton, 2 Salk. 528; Woodend *v.* Paulspury, 2 Ld. Raym. 1473; Potinger *v.* Wightman, 3 Mer. 67; Holyoke *v.* Haskins, 5 Pick. 20. See Story's Confl. of Laws, § 46, n. (2).

(*b*) Potinger *v.* Wightman, 3 Mer. 67; Holyoke *v.* Haskins, 5 Pick. 20. See Story's Confl. of Laws, § 46, n. (2).

(*c*) See *ante*, vol. 1, B. 2, ch. 2, and vol. 1, p. 440, n. (*n*).

all purposes, the place of payment or performance, is the place of the contract. (*d*) The most familiar instance is a promissory note, made, that is, signed, we will say in Boston, and payable in New York. Is this note to be construed by the law of Massachusetts or the law of New York? It would seem, from the authorities, that a contract may have two different places, the law of which enters into its construction. If it be payable, or to be performed otherwise, where it is signed, then that is its only place. If it be but a naked promise, without any special condition as to the place of payment, then it must be demanded of the maker where he is, or at his domicil, but it would be regarded as made where it was signed. If expressly payable in a place other than that where it is made, it would seem, according to some authorities, that the law of either place may be applied; thus, if the legal interest in New York is seven per cent., and the legal interest in Boston is six per cent., a note on interest payable at Boston, and made in New York, would be held not to be usurious in Boston if it expressed seven per cent. as its rate of interest; while according to other authorities, if payable at Boston, it must, wherever signed, conform to the law of Massachusetts in respect to interest, and would therefore be usurious there if it bore on its face more than six per cent., although not usurious at New York, where it was made. Our own opinion is decidedly in favor of the former view. That is, if a note be made, *bonâ fide*, in one place, expressly bearing an interest legal there, and payable in another place in which so high a rate of interest is not allowed, it may be sued in the place where payable, and the interest expressed recovered. Because the parties had their election to make the interest payable according to the law of either place; or to express the same thing differently, they may lawfully agree upon the largest interest allowed by the law of either place, or any less interest. (*e*) And if no in-

(*d*) Robinson *v.* Bland, 2 Burr. 1077; per *Baldwin*, J., in Strother *v.* Lucas, 12 Pet. 410, 436; Bell *v.* Bruen, 1 How. 169, 182; Le Breton *v.* Miles, 8 Paige, 261; Prentiss *v.* Savage, 13 Mass. 23; Thompson *v.* Ketcham, 8 Johns. 189; Cox *v.* the United States, 6 Pet. 172; Fanning *v.* Consequa, 17 Johns, 511; Andrews *v.* Pond, 13 Pet. 65.

(*e*) This is the result arrived at after

terest be expressed, then the interest will be measured by the law of the place where the note is payable.

much consideration, by the Supreme Court of Louisiana, in Depau *v.* Humphreys, 20 Mart. 1. Mr. Justice *Story*, in his Conflict of Laws, discusses the question at great length, and with a citation of very numerous authorities, most of which are from the civil law, and comes to an opposite conclusion, if we understand him aright, although some statements might leave the matter in doubt. In reference to the case of Depau *v.* Humphreys, he says: — "Another case has arisen of a very different character. The circumstances of the case were somewhat complicated, but the only point for consideration there arose upon a note, of which the defendants were the indorsers, and with the amount thereof they had debited themselves in an account with the plaintiff; and which they sought now to avoid upon the ground of usury. The note was given in New Orleans, payable in New York, for a large sum of money bearing an interest of ten per cent., being the legal interest of Louisiana, the New York legal interest being seven per cent. only. The question was whether the note was tainted with usury, and therefore void, as it would be, if made in New York. The Supreme Court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for either according to the law of Louisiana or according to that of New York. The court seem to have founded their judgment upon the ground, that in the sense of the general rule already stated, there are or there may be two places of contract; that in which the contract is actually made, and that in which it is to be paid or performed; *Locus, ubi contractus celebratus est; locus, ubi destinata solutio est;* and therefore, that if the law of both places is not violated, in respect to the rate of interest, the contract for interest will be valid. In support of their decision the court mainly relied upon the doctrines supposed to be maintained by certain learned jurists of continental Europe, whose language, however, does not appear to me to justify any such interpretation when properly considered, and is perfectly compatible with the ordinary rule, that the interest must be or ought to be according to the law of the place where the contract is to be performed, and the money is to be paid. It may not be without use to review some of the more important authorities thus cited, although it must necessarily involve the repetition of some which have been already cited." Confl. of Laws, § 298. Then after twenty pages of the examination of authorities, he comes to the conclusion that the decision of the court of Louisiana is not supported by the reasoning or principles of foreign jurists, and is directly opposed by the English case of Robinson *v.* Bland, 2 Burr. 1077, and the American case of Andrews *v.* Pond, 13 Pet. 65. Such is not our view of those cases. The first is wholly different in its facts. A bill of exchange was sued, drawn in France upon the drawer in England; and all that the case finds, so far as the present question is concerned, is, that Lord *Mansfield* says: — "The law of the *place*" (meaning France,) "can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." The case of Andrews *v.* Pond only decides that if the interest allowable at the place of payment be larger than that where the note is made or the bill drawn, the parties may stipulate for the higher interest. No doubt of this; but the case does not say that if the interest where the note is made be the highest, the parties may not stipulate for that; and this alone is the question. We consider Depau *v.* Humphreys as fully sustained by Pecks *v.* Mayo, 14 Verm. 33, and Chapman *v.* Robertson, 6 Paige, 627. The former was an action of assumpsit on two promissory notes given by Horatio Gates & Co., of Montreal, to the defendants, payable in Albany, N. Y., and by the defendants indorsed to the plaintiffs. It appeared that the notes were made at Montreal, where the makers resided, and that the indorsers and the plaintiffs resided in Vermont. The lawful rate of interest in Montreal was *six* per cent., and in New York *seven* per cent. per annum. *Redfield*, J., in delivering the opinion of the court, after an examination of all the authorities, says: — "From all

If a merchant in New York comes to Boston to buy goods, and there receives them, and gives his note for them,

which I consider the following rules in regard to interest on contracts made in one country, to be executed in another, to be well settled: 1. If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus by their own express contract determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract so entered into stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If the contract be so entered into for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed, according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country." Chapman *v.* Robertson, 6 Paige, 627, was a bill in equity to foreclose a mortgage, given by the defendant, a resident of New York, on lands in that State, to the complainant, who resided in England, to secure the payment of £800 sterling. The money was borrowed by Robertson when in England, upon an agreement for interest at the rate of seven per cent. per annum, payable annually. According to the agreement, Robertson upon his return to this country executed the bond and mortgage, and transmitted them to the complainant, who then deposited the £800 with Robertson's bankers in London. The defendant contended that as the original agreement for the loan was made in England, and the money was received there, the contract for the payment of more than five per cent. per annum rendered the bond and mortgage usurious and void. *Walworth*, C., after disposing of a preliminary point which arose in the case, said: — "The other point in this case presents a very nice question arising out of the conflict of laws in this State and England relative to the legal rate of interest. It is an established principle that the construction and validity of contracts which are purely personal depend upon the laws of the place where the contract is made, unless it was made in reference to the laws of some other place or country, where such contract, in the contemplation of the parties thereto, was to be carried into effect or performed. 2 Kent's Com. 457; Story, Confl. Laws, § 272. On the other hand, it appears to be equally well settled by the laws of every state or country, that the transfer of lands or other hereditable property, or the creation of any interest in, or lien or incumbrance thereon, must be made according to the *lex situs*, or the local law of the place where the property is situated. And it has been decided that the *lex loci rei sitæ* must also be resorted to for the purpose of determining what is, or is not, to be considered as real or hereditable property, so as to have locality within the intent and meaning of this latter principle. . . . . Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion that this mortgage executed here, and upon property in this State, being valid by the *lex situs*, which is also the law of the domicil of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here. If no rate of interest was specified in the contract, it might perhaps be necessary to inquire where the money was legally payable when it became due, for the purpose of ascertaining what interest the mortgagee was entitled to receive. Quince *v.* Callender, 1 Desaus. 160; Scofield et al. *v.* Day, 20 Johns. 102. But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made pay-

which specifies either Boston or no place for payment, it is a Boston transaction. When the note is due, it may be demanded of the maker wherever he is, but wherever demanded would be construed by the law of Massachusetts. If the note were made payable in New York, it could be demanded nowhere else, and would be construed by the law of New York. If he did not come to Boston, but sent his orders from New York, and the goods were sent to him from Boston, either by a carrier whom he pointed out, or in the usual course of trade, this would be a completion, a making, of the contract, and it would be a Boston contract, whether he gave no note, or a note payable in Boston, or one without express place of payment. (*f*) But if, as before, he gave his note payable in New York, it would be a New York note. And if, by the terms of the orders or the bargain, the

able to the creditor in that country, and at a rate of interest which is greater than is allowed by the laws of England. This question was very fully and ably examined by Judge Martin, in the case of Depean *v.* Humphreys, in the Supreme Court of Louisiana, (20 Martin, 1,) and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken, upon a loan, by the laws of the State where such note was made payable." In Hosford *v.* Nichols, 1 Paige, 220, where a contract for the sale of land situated in New York was made between two citizens of New York, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed, and taking a mortgage of the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was *held* that the giving the deed and taking the mortgage was only a consummation of the original contract made in New York, and that the mortgage was not void for usury. It is true that in this case the court also say: — "Again, there is no evidence in this case to show that the bond and mortgage were not both valid by the law of the State where they were originally executed. E. Kane testifies that at the time of their date, and for some years previous, six per cent. was the legal rate of interest in Pennsylvania. But it does not appear that any law existed in that State which prohibited the parties from agreeing upon a higher rate of interest, or declaring securities void in which a higher rate of interest was reserved. And courts of this State cannot take notice of the laws of other States, unless they are proved in the same manner as other facts." But there is little doubt that the decision would have been the same, independently of this last ground. See farther upon this question, Champant *v.* Ranelagh, Prec. in Ch. 128; Connor *v.* Bellamont. 2 Atk. 282; Stapleton *v.* Conway, 1 Ves. 427, 3 Atk. 727; Phipps *v.* Anglesea, 5 Vin. Abr. 209, pl. 8; 1 Eq. Cas. Abr. ch. 36, Tit. Interest Money, (E); Ekins *v.* East India Co. 1 P. Wms. 395; Anonymous, 3 Bing. 193; Fergusson *v.* Fyffe, 8 Cl. & Fin. 121; Harvey *v.* Archbold, Ry. & Mood. 184; Boyce *v.* Edwards, 4 Pet. 111; Fanning *v.* Consequa, 17 Johns. 511; Winthrop *v.* Carleton, 12 Mass. 4; Foden *v.* Sharp, 4 Johns. 183; Dewar *v.* Span, 3 T. R. 425.

(*f*) Whiston *v.* Stodder, 8 Mart. 95.

property in the goods were not to pass to the purchaser until their arrival in New York, they being previously at the risk of the seller, and then a note was given by the buyer in New York, this would be, we think, a New York transaction and a New York note, unless the note were made expressly payable in Boston. Such would be the inferences which we should draw from the reasons of the cases, and from what seem to be the stronger authorities; but many of these questions are not yet distinctly determined by adjudication. It is quite certain that the Roman civil law considered the place of payment or performance as the place of the contract. And this law has much title to respect on a question of this kind, both as the basis of a widely extended system of law now in force, and as the embodiment, in its commercial law, of sound sense and accurate justice.

It is to be noticed that the payment is to be measured or regulated by the law of the place where the note is by the terms of the contract to be performed, and not by that where it happens to be performed. A note made in Boston may be demanded and sued in England, or *vice versa;* because a note without a specified place of payment has no controlling place, but may be demanded of the maker wherever he is. But such a note would still be a Boston note or an English note, according to the place of its signature. In fact, all debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. (*g*)

(*g*) Blanchard *v.* Russell, 13 Mass. 1; Blake *v.* Williams, 6 Pick. 286; Braynard *v.* Marshall, 8 Id. 194. See also *ante*, p. 83, n. (*f*).

SECTION VI.

OF THE LAW OF THE FORUM IN RESPECT TO PROCESS AND REMEDY.

Every state holds jurisdiction over all persons and all things within its dominion, and no farther. In England and America, foreigners may avail themselves of the courts for suits or defences against each other, in like manner as citizens may. And a person who has property within the jurisdiction of an English or American court, is liable to the action of such court, though he himself may be out of the jurisdiction, provided he receives such notice as the general law of the state or the rules of the court may require. (*h*)

But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied. (*i*) A familiar instance of this is an action on an instrument which, having a scrawl with a mere *locus sigilli* upon it, was made in a State where this is all that is necessary to constitute it a sealed instrument, but is sued in a State where a seal of some kind must be put to it. This instrument must not only be declared on as a simple contract, but if sued there it is only as a simple contract that it will be there construed in respect to all the rights and obligations of the parties. (*j*)

(*h*) In this country we have, very generally, statutory provisions for giving absent defendants due notice; and there are generally, perhaps universally, rules of court and of practice, for the same purpose. And the principle that they are entitled to this protection is universally recognized. Fisher *v.* Lane, 3 Wils. 302, 303; The Mary, 9 Cranch, 126, 144; Bradstreet *v.* Neptune Ins. Co. 3 Sumn. 600.

(*i*) This rule is constantly asserted, not only by all civilians, but in numerous cases in England and this country. See Robinson *v.* Bland, 2 Burr. 1077; De La Vega *v.* Vianna, 1 B. & Ad. 284; Trimbey *v.* Vignier, 1 Bing. N. C. 151, 159; British Linen Co. *v.* Drummond, 10 B. & Cr. 903; Don *v.* Lippman, 5 Cl. & Fin. 1; Nash *v.* Tupper, 1 Caines, 402; Pearsall *v.* Dwight, 2 Mass. 84; Smith *v.* Spinolla, 2 Johns. 198; Van Reimsdyk *v.* Kane, 1 Gall. 371; Lodge *v.* Phelps, 1 Johns. Cas. 139, 2 Caines' Cas. in Error, 321; Peck *v.* Hozier, 14 Johns. 346; Jones *v.* Hook, 2 Rand. 303; Wilcox *v.* Hunt, 13 Pet. 378; Pickering *v.* Fisk, 6 Verm. 102.

(*j*) Andrews *v.* Herriot, 4 Cow. 508, overruling Meredith *v.* Hinsdale, 2 Caines, 362; Bank of United States *v.* Donnally, 8 Pet. 361; Douglas *v.* Oldham, 6 N. H. 150; Thrasher *v.* Ever-

Some question has arisen in the case of an arrest in a suit on a contract made where the arrest would not have been permitted by law; and it has been held that the right to arrest would be that only which was given by the law of the place where the contract was made. (*k*) It seems, however,

hart, 3 Gill & Johns. 234; Adam *v.* Kerr, 1 B. & P. 360.

(*k*) Such at least has been understood to be the decision of the court in Melan *v.* Fitzjames, 1 B. & P. 138. We would submit, however, that the judgment of the court in that case proceeded on a different ground. It was an action on an instrument executed in France. The defendant having been held to bail, a rule was obtained calling on the plaintiff to show cause why the bail bond should not be given up to be cancelled, on the defendant's entering a common appearance. At the hearing an affidavit of a French counsellor was produced, stating that, by the law of France, "not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort." After argument, the court made the rule absolute, *Heath*, J., dissenting. But it seems clear from the opinions delivered that *Eyre*, C. J., and *Rooke*, J., who constituted a majority of the court, went upon the ground that the instrument in question did not, according to the law of France, contain any *personal obligation*, and did not authorize any proceedings *in personam*, but only *in rem*. And it was upon this point that *Heath*, J., differed from them. *Eyre*, C. J., said: — "If it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, on the principle of preventing arrests so vexatious as to be an abuse of the process of the court, there seems to be fair ground on which the court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit, in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed. If there could be none in France, in my opinion there can be none here. I cannot conceive that what is no personal obligation in the country in which it arises, can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it." *Heath*, J., said: — "This, on consideration, does seem to me to be a personal contract, and if it be so, I have not the least doubt that the defendant should be held to bail. That being the case, we all agree, that in *construing* contracts, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws. But when we come to remedies it is another thing; they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements." *Rooke*, J. "I entirely agree with my Lord Chief Justice. Though the contract, on the face of it, may seem to bind the person of the Duke de Fitzjames, by the words "binding himself," &c., yet being made abroad, we must consider how it would be understood in the country where it was made. According to the affidavit which has been produced on one side, and not contradicted by the other, this contract is considered in France as not affecting the person. Then what does it amount to? It is a contract that the Duke's estate shall be liable to answer the demand, but not his person. If the law of France has said that the person shall not be liable on such a contract, it is the same as if the law of France had

to be settled otherwise, arrest being of the *remedy*, and not of the *right*. (*l*)

So too, limitation and prescription are applied only according to the law of the forum. At least, it seems quite well established, that a foreigner, bringing an action on a debt which is barred by lapse of time in the State where it is sued, but would not be at home, is bound by the law of the forum, and cannot recover payment. (*m*) The general reason is, that all States make their laws of peace to prevent oppressive and wasteful litigation within their jurisdiction, and have a right to determine for all who resort to their tribunals, how soon after the debt is due the creditor must claim it or lose it. But the question which might arise, if the action would be barred if brought in the place of the contract, but is not barred by the law of the forum, whether the shorter limitation, being that by the law of the place of contract, shall now prevail, is not so well settled. We should say, however, in this as in the former case, the law of the forum must govern, on the general ground that the whole question of

been expressly inserted in the contract. If it had been specially agreed between the parties not to consider the Duke's person liable, and under those circumstances he had come over here, there would have been no difference between us; for if it were *agreed* there that the person should not be liable, it would not be liable here. Now as far as I can understand the contract, this is the true meaning of it. The defendant is not bound by the mere words of the contract, but has a right to explain by affidavit how it would be considered in France. With the explanation given I am satisfied, and being satisfied with it, I think the defendant should be permitted to enter a common appearance." Such was also understood to be the turning point of the case by *Adair*, Sergeant, who showed cause against the rule. "This rule," said he, "was granted in order to ascertain whether the security in question was that kind of security which imported a remedy against the person of the defendant, or whether it was only in the nature of a mortgage on his estate. If this be a mere security, affecting the land and personal property only of the defendant, and if it so appears on the face of it, the court will attend to that circumstance. But if I can show that it is a personal security affecting the person and following it everywhere, whatever may be the law of France as to the form of proceeding, yet when the party is found in this or any other country, he may be proceeded against according to the rules and practice of the country in which he is resident."

(*l*) De La Vega *v.* Vianna, 1 B. & Ad. 284; Imlay *v.* Ellefsen, 2 East, 453; Peck *v.* Hozier, 14 Johns. 346; Hinkley *v.* Marlan, 3 Mason, 88; Titus *v.* Hobart, 5 Id. 378; Smith *v.* Spinolla, 2 Johns. 198; Woodbridge *v.* Wright, 3 Conn. 523; Atwater *v.* Townsend, 4 Conn. 47; Smith *v.* Healy, Id. 49; Whittemore *v.* Adams, 2 Cow. 626.

(*m*) British Linen Co. *v.* Drummond, 10 B. & Cr. 903; Van Reimsdyk *v.* Kane, 1 Gall. 371; Le Roy *v.* Crowninshield, 2 Mason, 151; Nash *v.* Tupper, 1 Caines, 402; Bank of United States *v.* Donnally, 8 Pet. 361; Ruggles *v.* Keeler, 3 Johns. 263; Dupleix *v.* De Roven, 2 Verm. 540; Decouche *v.* Savetier, 3 Johns. Ch. 190; Lincoln *v.* Battelle, 6 Wend. 475; M'Elmoyle *v.* Cohen, 13 Pet. 312.

limitation or prescription is one of process and remedy, and not of right and obligation. (*n*)

(*n*) Williams *v.* Jones, 13 East, 439 ; Medbury *v.* Hopkins, 3 Conn. 472; Van Reimsdyk *v.* Kane, 1 Gall. 371 ; Le Roy *v.* Crowninshield, 2 Mason, 151; Huber *v.* Steiner, 2 Bing. N. C. 202 ; Decouche *v.* Savetier, 3 Johns. Ch. 190 ; Ruggles *v.* Keeler, 3 Johns. 263 ; Pearsall *v.* Dwight, 2 Mass. 84. Mr. Justice *Story*, in his Conflict of Laws, § 582, takes this distinction. "Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and the parties are resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, under such circumstances the question might properly arise whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by way of extinguishment or transfer of the claim or title. This is a point which does not seem to have received as much consideration in the decisions of the common law as it would seem to require." In Don *v.* Lippman, 5 Cl. & Fin. 16, Lord *Brougham* speaks of this as an excellent distinction. And it is approved of by *Tindal*, C. J., in Huber *v.* Steiner, 2 Bing. N. C. 202. But in Bulger *v.* Roche, 11 Pick. 36, where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country, it was *held* that such debt could not be recovered in Massachusetts, though the action was brought within six years after the parties came into that commonwealth. And *Shaw*, C. J., said: — "That the law of limitation of a foreign country cannot of itself be pleaded as a bar to an action in this commonwealth seems conceded, and is indeed too well settled by authority to be drawn in question. Byrne *v.* Crowninshield, 17 Mass. 55. The authorities, both from the civil and the common law, concur in fixing the rule, that the nature, validity, and construction of contracts is to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. Whether a law of prescription or statute of limitation, which takes away every legal mode of recovering a debt, shall be considered as affecting the contract like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as affecting the remedy only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. It was ably discussed upon general principles in a late case (Le Roy *v.* Crowninshield, 2 Mason's Rep. 151,) before the Circuit Court, in which, however, it was fully conceded by the learned judge, upon a full consideration and review of all the authorities, that it is now to be considered a settled question. A doubt was intimated in that case, whether, if the parties had remained subjects of the foreign country until the term of limitation had expired, so that the plaintiffs' remedy would have been extinguished there, such a state of facts would not have presented a stronger case, and one of more serious difficulty. Such was the case in the present instance, but we think it sufficient to advert to a well settled rule in the construction of the statute of limitations, to show that this circumstance can make no difference. The rule is this, that where the statute has begun to run, it will continue to run, notwithstanding the intervention of any impediment, which, if it had existed when the cause of action accrued, would have prevented the operation of the statute. For instance, if this action accrued in Nova Scotia in 1821, and the plaintiff or defendant had left that country in 1825 within six years, in 1828, after the lapse of six years, the action would be as effectually barred, and the remedy extinguished there, as if both had continued to reside in Halifax down to the same period. So that when the parties met here in 1829, so far as the laws of that country, by taking away all legal remedy, could affect it, the debt was extinguished, and that equally whether they had both remained under the jurisdiction of those laws

If one holds personal property by adverse title, long enough to acquire a title to it in that way by the law of prescription of the place where he holds it, and afterwards removes with the property to a place where the prescription necessary to give title is longer, the original owner cannot, as it seems, maintain his title in this new place, but is bound by the prescription of the former place. (*o*)

SECTION VII.

OF FOREIGN MARRIAGES.

It seems to be generally admitted, and is certainly a doctrine of English and American law, that a marriage which is valid in the place where it is contracted is valid everywhere. (*p*) The necessity and propriety of this rule are so

till the time of limitation had elapsed, or whether either or both had previously left it. The authorities referred to, therefore, must be held applicable to a case where both parties were subject to the jurisdiction of a foreign state when the bar arising from its statute of limitations attached. The same conclusion results from the reason upon which these cases proceed, which is, that statutes of limitation affect only the time within which a legal remedy must be pursued, and do not affect the nature, validity, or construction of the contract. This reason, whether well founded or not, applies equally to cases where the term of limitation has elapsed, when the parties leave the foreign state, as to those where it has only begun to run before they have left the state, and elapses afterwards."

(*o*) Beckford *v.* Wade, 17 Ves. 87. And see Shelby *v.* Guy, 11 Wheat. 361.

(*p*) In England this may be considered as established law, at least since 1768, when the case of Compton *v.* Bearcroft was decided. That case is thus stated in Buller's Nisi Prius, pp. 113, 114: — "The appellant and respondent, both English subjects, and the appellant being under age, ran away, without the consent of her guardian, and were married in Scotland, and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good." An account of this case will be found also in Middleton *v.* Janverin, 2 Hagg. Consist. Rep. 443. The case of Conway *v.* Beazley, 3 Hagg. 639, has been supposed to hold an opposite doctrine; but this case only decides that a Scotch divorce, where the husband and wife were domiciled in England at the time, and had been married in England, is void there. See remarks on this case in Bishop's valuable work on Marriage and Divorce, §§ 127, 128. The same rule is generally held in this country. Thus in Medway *v.* Needham, 16 Mass. 157, where parties incapable by the law of Massachusetts of contracting marriage with each other, by reason of one of them being a white person and the other a negro, went, for the express purpose of evading the law, into Rhode Island, where such marriages are allowed, and were there married, and immediately returned, it was *held* that the marriage, being good in Rhode Island, was good in Massachusetts. And *Parker*, C. J., said: — "According to the case settled

obvious and so stringent, that it can hardly be called in question. Nevertheless, it must be subject to some qualification.

in England by the ecclesiastical court, and recognized by the courts of common law, the marriage is to be held valid or otherwise according to the laws of the place where it is contracted; although the parties went to the foreign country with an intention to evade the laws of their own. This doctrine is repugnant to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country where the parties have their domicil could not, except in the contract of marriage, be protected under the general principle. Thus parties intending to make a usurious bargain cannot give validity to a contract, in which more than the lawful interest of their country is secured, by passing into another territory where there may be no restriction of interest, or where it is established at a higher rate, and there executing a contract before agreed upon. The exception in favor of marriages so contracted must be founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose state in which people so situated would live." So in Putnam *v.* Putnam, 8 Pick. 433, where parties, both resident in Massachusetts, where one of them having been divorced for his adultery, was therefore prohibited under a general statute from contracting marriage while his late wife was living, went, in order to evade this statute, into the adjoining State of Connecticut, where no such prohibition existed, and were there married, and immediately returned, the marriage was held to be good in Massachusetts. *Parker*, C. J., in delivering the judgment of the court, after referring to the case of Medway *v.* Needham, said: — "This decision covers the whole ground of the present case, and to decide this against the petitioner would be to overrule that decision. The court were aware of all the objections to the doctrine maintained in that case, and knew it to be *vexata quæstio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage, which by the laws of the country where it was entered into was valid. The condition of parties thus situated, the effect upon their innocent offspring, and the outrage to public morals, were considered as strong and decisive reasons for giving place to the laws of the foreign country, not merely on account of comity, for that would not be offended by declaring null a contract made in violation of the laws of the state in which the parties lived, by evasion, but from general policy; nor will the same principle be necessarily applied to contracts of a different nature — usurious, gaming, or others made unlawful by statute or common law; for comity will not require that the subjects of one country shall be allowed to protect themselves in the violation of its laws, by assuming obligations under another jurisdiction, purposely to avoid the effect of those laws. The law on this subject having been declared by this court ten years ago, in the case before cited, it is binding upon us and the community until the legislature shall see fit to alter it. If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explicitly enact, that marriages contracted within another State, which if entered into here would be void, shall have no force within this commonwealth. But it is a subject which, whenever taken into consideration, will be found to require the exercise of the highest wisdom." This judgment was pronounced in 1829. But in 1835, at the time of the passage of the Revised Statutes, the legislature interfered by enacting as follows: — "When any persons, resident in this State, shall undertake to contract a marriage, contrary to the preceding provisions of this chapter, and shall, in order to evade those provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this State." Rev. Stat. ch. 75, sect. 6. As to what cases this statute embraces, see Sutton *v.* Warren, 10 Metc. 451; Commonwealth *v.* Hart, 4 Cush. 49. The case of Williams *v.*

A marriage made elsewhere would not be acknowledged as

Oates. 5 Iredell, 535, contains a doctrine materially different from that of the Massachusetts cases already cited. That was a petition by the plaintiff, as widow of the defendant's intestate, for an allowance out of his estate. It appeared that the plaintiff had formerly intermarried with one Allen in North Carolina, both being domiciled there. Her husband afterwards instituted a suit against her for a divorce for cause of adultery on her part, in which there was a decree divorcing him *a vinculo matrimonii*. Afterwards the plaintiff and the defendant's intestate, both being citizens of North Carolina, and domiciled there, with the purpose of evading the laws of that State, which prohibited her from marrying again, went into South Carolina and there intermarried, according to the laws of that State, and immediately returned to North Carolina, and continued to live there for several years as husband and wife, until the death of the intestate. And the Supreme Court of North Carolina held this latter marriage to be void. *Ruffin*, C. J., said: — "It is unquestionable that if this second marriage, in this case, had been celebrated in this State, it would have subjected the plaintiff to the pains of bigamy, and would have been void. The case stands, as to her, precisely as if there never had been a divorce; and, *pro hac vice*, the first marriage is still subsisting. We conceive the second marriage acquires no force by the celebration of it having been in South Carolina. We have been at some loss to determine in what sense we are to understand the phrase in the case, that the parties married in South Carolina, "according to the laws of that State." We suppose it was meant to say thereby merely that the ceremony was duly celebrated with the formalities, and by the persons, and with the witnesses, there requisite to constitute a marriage. It would be great injustice to our sister State to assume that by her laws her own citizens can marry a second time, a former marriage not being dissolved by death or divorce; or that she makes it lawful for citizens of other States, who have married at home, and by their domestic laws cannot marry a second time, to leave their own State and go into South Carolina expressly to evade their own laws, and, without acquiring a domicil in South Carolina, contract a marriage there. We cannot suppose that South Carolina allows of polygamy, either by her own citizens or those of any other country. Therefore we might cut the case short at that point, upon the presumption that, the contrary not expressly appearing, the law of South Carolina does not tolerate this marriage more than our own law does. Indeed, we believe that in truth she does not so much, as we have been informed that she grants no divorces. But if it were otherwise, we should still hold the marriage void. We do not undertake at present to say what might be the effect of a marriage of a person, in the situation of this plaintiff, contracted in another State in which she had become *bonâ fide* domiciled. . . . . The case before us is not one of a domicil out of North Carolina, but it is stated that the parties were domiciled here, and went to South Carolina in fraud of our law. Now if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country purposely to defraud them. It cannot allow such acts abroad, under the pretence that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory. If a person contract marriage here, and, living the other party, he goes to Turkey, and marries half a dozen wives, contrary to the laws of this State, it would be impossible that we could give up our whole policy regulating marriages and inheritances, and allow all those women and children to come in here, as wives and heirs, with the only true wife and heirs according to our law. And it would be yet more clear, if two persons were to go from this country to Turkey, merely for the sake of getting married at a place in which polygamy is lawful, and then coming back to the place where it is not lawful. . . . . Certainly every country should be disposed to respect the laws of another country; but not more than its own.

valid in a state the law of which forbade it as incestuous ; (*q*) although a question might be made whether it would be

That ought not to be expected. If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home. But an American marries at home, where plurality of wives is excluded, and then, contrary to his engagement with that wife, takes another, where a plurality of wives is tolerated, and the first wife claims the benefit of the law of her own country from the courts of her own country, while the second wife claims from the same courts the immunities and rights conceded to her in the law of her original country. These claims are incompatible, and one only can be granted; and it is easy to see that the obligations arising out of the first contract are to be sustained by the country in which they were assumed ; and that our courts must hold the second marriage void in our law, which denied the capacity to contract it. For the same reason we must obey the positive injunction of our statute, which applies to this case."—In Dickson *v.* Dickson, 1 Yerg. 110, which was a petition for Dower, it appeared that the plaintiff had formerly been married in Kentucky, and had been there divorced, she being the offending party. She afterwards removed to Tennessee and was married again, her former husband living. It further appeared, that by the law of Kentucky, a divorce obtained in that State does not release the offending party from the pains and penalties of bigamy, if he or she afterwards marry. Under these circumstances the question arose whether the second marriage should be held valid by the courts of Tennessee. And it was *held* that it should. *Catron*, J., said : — " Mary May was legally divorced from her husband, Benjamin May, by the Union Circuit in Kentucky ; being a court of competent jurisdiction over the subject-matter and the parties — the decree dissolving the marriage is conclusive on all the world. The statute of Kentucky provides that the offending party (the petitioner in this case) shall not be released from the marriage contract, but shall be subject to all the pains and penalties of bigamy. It is impossible, in the nature of things, that all the relations of wife shall exist when she has no husband ; who, as soon as the decree dissolving the marriage was pronounced, was an unmarried and single man, freed from all connections and relations to his former wife ; and equally so was the petitioner freed from all marriage ties and relations to Benjamin May, in reference to whom she stood like unto every man in the community. Therefore, *he* has no right to complain of the second marriage. Who has? Not the commonwealth of Kentucky, whose penal laws cannot extend beyond her own territorial jurisdiction, and cannot be executed or noticed in this State, where the second marriage took place, and the violation of said laws was effected. Had Mary May married a second time in Kentucky, such second marriage would not be void because she continued the wife of Benjamin May, but because such second marriage in that State would have been in violation of a highly penal law against bigamy ; and it being a well settled principle of law that any contract which violates the penal laws of the country where made shall be void. The inquiry with this court is not, however, nor cannot be whether the laws of Kentucky have been violated by this second marriage — but have our own laws been violated? The act of 1820, ch. 18, against bigamy, declares it felony for any person to marry having a former husband or wife living. Mary May had no husband living, and is not guilty of bigamy by our statute ; nor has she violated the sanction of any penal law of this State." See farther, on the proposition stated in the text, Scrimshire *v.* Scrimshire, 2 Hagg. Consist. Rep. 395 ; Herbert *v.* Herbert, Id. 263. 3 Phillimore, 58 ; Swift *v.* Kelly, 3 Knapp. 257 ; Munro *v.* Saunders, 6 Bligh, 468 ; State *v.* Patterson, 2 Ired. 346 ; Fonnshill *v.* Murray, 1 Bland's Ch. 479 ; Dumaresly *v.* Fishly, 3 A. K. Marsh. 368 ; Wall *v.* Williamson, 8 Ala. 48 ; Lacon *v.* Higgins, 3 Stark. 178 ; Morgan *v.* McGhee, 5 Humph. 13.

(*q*) Greenwood *v.* Curtis, 6 Mass. 358, 378 ; Sneed *v.* Ewing, 5 J. J. Marsh. 460, 489 ; Sutton *v.* Warren, 10 Met. 451. And see Wightman *v.* Wightman, 4 Johns. Ch. 343.

held incestuous, so far as to avoid the marriage, if within the degrees prohibited by the law of the state in which the question arose, or only if it were between kindred who are too near to marry by the law of the civilized world. (*r*) Thus, if it be the law in England that a man shall not marry the sister of his deceased wife, the validity of such a marriage contracted abroad might be determined in England by a reference to the question of domicil. That is, an Englishman going abroad, and there marrying his wife's sister, might, on his return, be held not to have legally married; while two Americans contracting such a marriage here, where it is certainly lawful, would be held to be husband and wife in England. We think, however, that both here and in England the law of the place of the marriage would prevail in such a case over the law of the domicil. (*s*) But if a married man, a

(*r*) See Sutton *v.* Warren, 10 Met. 451, and Bonham *v.* Badgley, 2 Gilman, 622, as cited *ante*, vol. 1, p. 563, n. (*c*).

(*s*) See preceding note. In Warrender *v.* Warrender, 9 Bligh, 89, 112, Lord *Brougham* said, *obiter* however: — "We should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country." In True *v.* Ranney, 1 Fost. 55, *Gilchrist*, C. J., extends the exception to the rule that marriages valid where celebrated are valid everywhere to cases in which the marriage is opposed to "the municipal institutions of the country" where the rule is sought to be applied. See *ante*, vol. 1, p. 565, n. (*j*). But we think this is going rather too far. In Greenwood *v.* Curtis, 6 Mass. 358, 378, the court say: — "If a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States. Such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract." And Mr. Justice *Story*, after quoting this language, says: — "Indeed, in the diversity of religious opinions in Christian countries, a large space must be allowed for interpretation, as to religious duties, rights, and solemnities. In the Catholic countries of continental Europe, there are many prohibitions of marriage, which are connected with religious canons and establishments, and in most countries there are some positive or customary prohibitions, which involve peculiarities of religious opinion or of conscientious doubt. It would be most inconvenient to hold all marriages celebrated elsewhere void which are not in scrupulous accordance with the local institutions of a particular country." Confl. of Laws, § 116. It is to be remembered that even incestuous marriages are not void at common law, but only voidable; and voidable only during the lives of both parties; for after the death of

citizen of one of our States, journeyed into a Mormon territory, and there married again, he certainly would not be held on his return to be the lawful husband of two wives. And it may be, at least, conjectured, that if a Mormon came into Massachusetts or New York with half a dozen wives, he would not be held there to be the lawful husband of all of them. (*t*)

The fact that the parties went abroad for the purpose of contracting a marriage there, which would be illegal at home, ought, it might seem, to destroy the validity of the marriage at home. But the contrary doctrine appears to have been held, and to be established in England and in this country. (*u*) There must, however, be some limit to this. The common case of Gretna Green marriages only shows that persons may be married in Scotland, and then regarded in England as husband and wife, who could not have been married *in that way* in England. At least we are not aware of any English case recognizing the validity of a marriage contracted abroad between English subjects who could not, in any way, become legally husband and wife by any marriage contracted in England. In Massachusetts the cases go somewhat farther, but expressly except those foreign marriages "which would tend to outrage the principles and feelings of all civilized nations." (*v*) It may, however, be

either, they are valid, as to the legitimacy of the children, and it would seem all other purposes. See 1 Bl. Com. 434, 435, and 2 Inst. 614. See also Bonham *v.* Badgley, 2 Gilm. 622; Sutton *v.* Warren, 10 Met. 453; Ray *v.* Sherwood, 1 Curt. 193, 199. The rule is, that for *civil* disabilities, such as prior marriage, idiocy, and the like, the marriage may be declared either *before* or *after* the death of the parties, or either of them, to have been void from the beginning; but for *canonical* disabilities only during the lives of both; and canonical disabilities are said to be consanguinity, affinity, and certain corporal infirmities. See Elliott *v.* Gurr, 2 Phill. 16; Gathings *v.* Williams, 5 Iredell, 487. The statute of 6 Wm. 4, ch. 54, makes some of these marriages absolutely void.

(*t*) It might be a different question whether his children by all his wives, who were *equally* his wives, were all legitimate. In Wall *v.* Williamson, 8 Ala. 48, the court say: — "A parallel case to a Turkish or other marriage in an infidel country, will probably be found among all our savage tribes; but can it be possible that the children must be illegitimate if born of the second or other succeeding wife?" And in reference to the case put in the text, *Ruffin*, C. J., says, in Williams *v.* Oates, 5 Iredell, 535, 541, cited *ante*, p. 107, n. (*p*): — "If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home."

(*u*) See *ante*, p. 104, n. (*p*).

(*v*) Medway *v.* Needham, 16 Mass. 157.

remarked, that while the converse of this rule is also true, and a marriage which is void where contracted is valid nowhere, (*w*) there must also be some exceptions to this rule; as if two Americans intermarried in China, where the marriage was celebrated in presence of an American chaplain, according to the American forms. If such a marriage were perfectly void in China, it would nevertheless be held certainly valid here. (*x*)

It is also the general rule, both in England and in this country, that the incidents of marriage, and contracts in relation to marriage, as settlements of property and the like, are to be construed by the law of the place where these were made; for any different construction cannot be supposed to carry into effect the intentions and agreements of the parties, or to deal with them justly. (*y*) This being the reason of the rule, it cannot apply to the construction of settlements and the like, where the parties are married while accidentally or transiently absent from their homes, without actual or intended change of domicil, and make their settlements or arrangements there, at the time of marriage; for in such cases the law of the domicil should govern, and the marriage, although actually foreign, should be regarded as constructively and virtually domestic. For, as a general rule, the

(*w*) M'Culloch *v.* M'Culloch, Ferg. Divorce Cases, 257; Dalrymple *v.* Dalrymple, 2 Hagg. Consist. Rep. 54; Kent *v.* Burgess, 11 Sim. 361; Scrimshire *v.* Scrimshire, 2 Hagg. Consist. Rep. 395.

(*x*) Ruding *v.* Smith, 2 Hagg. Consist. Rep. 371; Kent *v.* Burgess, 11 Sim. 361; The King *v.* Brampton, 10 East, 282; Newbury *v.* Brunswick, 2 Verm. 151. In Harford *v.* Morris, 2 Hagg. Consist. Rep. 430, Sir George *Hay* says: — "Will anybody say, that before the act, a marriage solemnized by persons going over to Calais, or happening to be there, was void in this country, because such a marriage might be void by the laws of France, as perhaps it was, if solemnized by a Protestant priest, whom they do not acknowledge, or if in any way clandestine, or without consent; and that therefore it should be set aside by a court in England, upon account of its being void by the law of France? No." And on p. 432, he says: — "And here I must observe, that I do not mean that every domicil is to give a jurisdiction to a foreign country, so that the laws of that country are necessarily to obtain and attach upon a marriage solemnized there; for what would become of our factories abroad, in Leghorn or elsewhere, where the marriage is only by the law of England, and might be void by the law of that country; nothing will be admitted in this court to affect such marriages so celebrated, even where the parties are domiciled."

(*y*) Feanbert *v.* Turst, Prec. in Ch. 207, 1 Bro. P. C. 38, Robertson's App. Cas. 3; Anstruther *v.* Adair, 2 My. & K. 513; Freemoult *v.* Dedire, 1 P. Wms. 429; Decouche *v.* Savetier, 3 Johns. Ch. 190; Crosby *v.* Berger, 3 Edw. Ch. 538; De Barante *v.* Gott, 6 Barb. 492.

rights of the parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled. (*z*)

In respect to the capacity of the wife to contract with a third party, we are inclined to hold that the law of the place of the contract determines this, as well as other questions of capacity, at least in respect to personal contracts, although in the absence of sufficiently direct adjudication, and in the conflict of opinion to be found in text-writers, it is difficult to ascertain what the law is on this point. And it must depend much on the circumstances. If an American wife, for instance, being only on a brief visit in some country where she may contract, does so on some accidental occasion, it might be more doubtful whether the contract, though valid where made, would have any force on her return to this country. But if husband and wife go abroad, and visit a country for business purposes, and there enter into business contracts binding both by the law of that place, although it might be difficult to enforce the contract against the wife in America, while the husband lived, we should think the contract would be valid, and enforceable here after her husband's death, and perhaps against a second husband. (*a*)

There is one peculiar result of marriage, which seems to be an exception. In some places, if the parents of a child intermarry after his birth, this marriage legitimates him. In England and in this country it does not. It has been held in England that such subsequent marriage in Scotland, where it legitimates the child, did not so far legitimate him

(*z*) Le Breton *v.* Nouchet, 3 Mart. 60; Ford *v.* Ford, 14 Mart. 574; Allen *v.* Allen, 6 Rob. La. 104; Doe *v.* Vardill, 5 B. & Cr. 438. It seems that parties cannot by a contract made in Louisiana provide effectually that the rights of the parties shall be determined by the provisions of a specified foreign law. Bourcier *v.* Lanusse, 3 Martin, 581. But though the contract be made in one country, and it refer to the law of another, it will be valid and effectual if both parties have agreed upon making that other country their place of residence, and do actually settle there. For even without a contract, the rights of the husband to the wife's property are determined in such case by the law of the intended and actual subsequent domicil. Le Breton *v.* Miles, 8 Paige, 261; Kneeland *v.* Ensley, Meigs, 620; Lyon *v.* Knott, 2 Am. Law Reg. 604.

(*a*) In the absence of much direct adjudication, we refer the reader to the following authorities, as bearing more or less directly upon this question. Polydore *v.* Prince, Ware, 402; Drue *v.* Thorne, Aleyn, 72; Thompson *v.* Ketcham, 8 Johns. 189; Garnier *v.* Poydras, 13 Louis. 177; Potter *v.* Brown, 5 East, 131.

in England as to enable him to take by inheritance land situated in England. (*b*) The rule would be otherwise as to personal property, the law of the domicil of the parents determining the legitimacy as to that. And we think that such a marriage in Scotland, supposing parents and child afterwards to come to America and be naturalized here, would be held here to make the child an heir, as well as to give him all other rights of legitimacy. (*c*)

The place of marriage does not determine absolutely as to the domicil acquired by marriage. It would be obviously unreasonable to permit the domicil of the parties to depend upon the mere place where the marriage is celebrated, while the parties are perhaps only *in transitu*. This question is therefore settled by their actual domicil at the time; the husband's domicil is determined by the two elements of actual residence and intent, as in other cases; while the wife acquires by marriage the domicil of the husband, and changes it as his changes. (*d*) And in such case the wife's rights in

(*b*) Doe *v.* Vardill, 5 B. & Cr. 438, 9 Bligh, 32.

(*c*) Such seems very certainly to be the doctrine of the greater number and most authoritative of the civilians. See *Story* on Confl. of Laws, § 93 a, *et seq.*

(*d*) See *ante*, p. 94, n. (*y*). But the wife may, so far as the question of divorce is concerned, have a domicil distinct from that of the husband. In Harteau *v.* Harteau, 14 Pick. 181, *Shaw*, C. J., after considering certain questions arising in the case which have no direct bearing upon this point, says: — "This suggests another course of inquiry, that is, how far the maxim is applicable to this case, that the domicil of the wife follows that of the husband. Can this maxim be true, in its application to this subject, where the wife claims to act, and by law, to a certain extent and in certain cases, is allowed to act adversely to her husband? It would oust the court of its jurisdiction, in all cases where the husband should change his domicil to another State before the suit is instituted. It is in the power of a husband to change and fix his domicil at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for a divorce in this State, where, till such change of domicil, they had always lived. He clearly lives in Rhode Island; her domicil, according to the maxim, follows his; she therefore, in contemplation of law, is domiciled there too; so that neither of *the parties* can be said to *live* in this commonwealth. It is probably a juster view, to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption, that from the nature of that relation the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognize a wife as having a separate existence and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicil and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the

and to the property of the husband, or her own, would be determined by the law of that domicil, so far at least as relates to the personal property of both, and the real property of the husband. If the wife had real property in the country of her own domicil, hers and her husband's rights in respect to it might now be governed by the *lex loci rei sitæ*.

SECTION VIII.

OF FOREIGN DIVORCES.

The relation of the law of place to the subject of divorce presents questions of much difficulty. And although we have many cases involving some of these questions, decided after very full consideration, both in England and in this country, many topics remain, in relation to which there exists at present much uncertainty.

The law of divorce differs greatly in different countries, because marriage itself is viewed under so great a diversity of aspect. The Catholic Church regards it as a sacrament, over which the civil law and civil tribunals have no power whatever, and which can only be dissolved by the supreme

parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicil at will, but not in that of the wife." Mr. Bishop, in his work on Marriage and Divorce, § 730, after quoting from the preceding case, says: "And the doctrine that, for purposes of divorce, the wife may have a domicil separate from her husband, is well established in the American tribunals, although some of the authorities would seem to take the distinction, (it is submitted without proper foundation,) that a wife cannot lose her domicil by the husband's change of residence after the offence is committed, yet cannot on the other hand acquire a new one. Indeed it has been distinctly laid down that the wife cannot, by a removal of her habitation after the commission of the offence, acquire a new jurisdiction in which to prosecute her claim for divorce, though it is believed that the preponderance of American authority, as well as weight of argument, is greatly the other way." See further on this question, Irby *v.* Wilson, 1 Dev. & Bat. Eq. 568, 582; Frary *v.* Frary, 10 N. H. 61; Harding *v.* Alden, 9 Greenl. 140; Sawtell *v.* Sawtell, 17 Conn. 284; Brett *v.* Brett, 5 Met. 233; Tolen *v.* Tolen, 2 Blackf. 407; Jackson *v.* Jackson, 1 Johns. 425; Maguire *v.* Maguire, 7 Dana, 181; Pawling *v.* Willson, 13 Johns. 192, 208. If the husband and wife have been separated by a judicial decree, and are living separate, the domicil of the wife is independent of that of the husband. Williams *v.* Dormer, 9 Eng. Law & Eq. 598.

spiritual power of the church. Protestants deny it to be a sacrament. They regard it as a civil contract, of a religious character it may be, and therefore properly associated with religious ceremonies; but wholly within the power of the civil authority. But England, which was Catholic while its common law was in course of formation, had no means provided for effecting divorce after it became Protestant; and in that country complete divorce, *a vinculo*, is effected only by parliament. In nearly all other Protestant countries judicial tribunals may grant divorces. In the States of this Union, divorce is granted in some by the tribunals, for reasons which are defined by statute. In some States these causes are limited to adultery, and facts of equivalent character, and in others are extremely liberal, not to say lax. And in some of the States it is the custom for the legislatures to grant divorces by private acts, and in practice this is sometimes done for very feeble reasons, and almost without other reason than the request.

The question must therefore be one of much difficulty, how far a State will recognize the validity of a foreign divorce, granted, perhaps, for causes which the law of the tribunal trying the question would hold to be wholly insufficient.

The general rule is certainly this. A divorce granted in a State in which both parties had their actual domicil, *and* were married, is valid everywhere. (*e*) Then it may be said that, generally, every State recognizes the validity of a divorce granted where both parties have their actual domicil, if granted according to the law of that place. It has been very authoritatively declared to be the law of England, that the tribunals of that country acknowledge no foreign divorce of an English marriage. (*f*) A more careful consideration

(*e*) Story's Con. of Laws, § 201; 2 Kent's Com. 108. It would not be easy to find this rule established by distinct adjudications, for the reason that it is too well settled to be questioned.

(*f*) In Lolley's case, Russ. & Ry. Cr. Cas. 237, English subjects were married in England; the husband went to Scotland; there he was divorced *a vinculo*; he returned to England and married there, his first wife living; he was indicted for bigamy, convicted, and sentenced to transportation. Lord *Brougham*, in deciding M'Carthy *v.* Decaix, 2 Russ. & My. 614, 619, comments upon Lolley's case, and upon Lord *Eldon's* remarks upon it, and says: — "I find, from the note of what fell from Lord

of the cases would, however, lead to the conclusion, that the *established* rule in England goes no farther, than that an

Eldon on the present appeal, that his lordship labored under considerable misapprehension as to the facts in Lolley's case; he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide, whether the marriage was or not prematurely determined by the Danish divorce. His words are, 'I will not without other assistance take upon myself to do so.' Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established. For what was Lolley's case? It was a case the strongest possible in favor of the doctrine contended for. It was not a question of civil right, but of felony. Lolley had *bonâ fide*, and in a confident belief, founded on the authority of the Scotch lawyers, that the Scotch divorce had effectually dissolved his prior English marriage, intermarried in England, living his first wife. He was tried at Lancaster for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who after hearing the case fully and thoroughly discussed, first at Westminster Hall, and then at Sergeant's Inn, gave a clear and unanimous opinion, that no divorce, or proceeding in the nature of divorce, in any foreign country, Scotland included, could dissolve a marriage contracted in England; and they sentenced Lolley to seven years' transportation. And he was accordingly sent to the hulks for one or two years; though in mercy the residue of his sentence was ultimately remitted. I take leave to say, he ought not to have gone to the hulks at all, because he had acted *bonâ fide*, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to show clearly that the judges were confident of the law they had laid down; so that never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that had been done which the law declares to be felony. I hold it to be perfectly clear, therefore, that Lolley's case stands as the settled law of Westminster Hall at this day. It has been uniformly recognized since; and in particular it was repeatedly made the subject of discussion, before Lord *Eldon* himself, in the two appeals of Tovey *v.* Lindsay, 1 Dow, 117, 131, in the House of Lords, when I furnished his lordship with a note of Lolley's case, which he followed in disposing of both those appeals, so far as it affected them. That case then settled that no foreign proceeding in the nature of a divorce in an ecclesiastical court could effectually dissolve an English marriage." But in Conway *v.* Beazley, 3 Hagg. Ecc. Rep. 639, 643, Dr. *Lushington* says: — "Cases have been cited in which it is alleged that a final decision has been pronounced by very high authority upon the operation of a Scotch divorce on an English marriage, — that it has been determined that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal, — that the contract remains forever indissoluble. The authorities principally relied upon for establishing that position are the decisions of the twelve judges in Lolley's case, and the decision of the present Lord Chancellor on a very recent occasion. If those authorities sustained to its full extent the doctrine contended for, the court would feel implicitly bound to adopt it; but I must consider whether in Lolley's case it was the intention of those very learned persons to decide a principle of universal operation, absolutely and without reference to circumstances, or whether they must not almost of necessity be presumed to have confined themselves to the particular circumstances that were then under their consideration. Lolley's case is very briefly reported, none of the authorities cited on the one side or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have is the decision. It is much to be regretted that some more extended report of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted, have not been communi-

English marriage cannot be terminated by a foreign divorce, unless both parties are actually domiciled in the country where the divorce takes place. This, however, is much farther than all courts or legislatures go; for some hold, and practise upon the rule, that if the parties, or indeed if only the party seeking the divorce, is within the jurisdiction of the court by a present domicil, it is enough, without asking whether the party came there merely for the purpose of obtaining the divorce. (*g*)

cated to the profession and to the public. In that case the indictment stated that on the 18th of July, Lolley was married at Liverpool to Ann Levaia, and afterwards to Helen Hunter, his former wife being then living. It was proved that both marriages were duly solemnized at Liverpool, that the first wife was alive a week before the assizes, and that the second wife agreed to marry the prisoner if he could obtain a divorce. The jury did not find that any fraud had been committed, but there does not appear to have been any discussion upon the very important question of domicil. A case in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them have any connection) for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; as where, prior to the cause arising on account of which a divorce was sought, the parties had been *bonâ fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to, assume it to have been established as an universal rule, that a marriage had in England, and originally valid by the law of England, cannot under any possible circumstances be dissolved by the decree of a foreign court. Before I could give my assent to such a doctrine, (not meaning to deny that it may be true) I must have a decision after argument upon such a case as I will now suppose, viz, a marriage in England — the parties resorting to a foreign country, becoming actually *bonâ fide* domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then indeed it might have set this important matter at rest, but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty that it never has received any express decision."

(*g*) There is but little uniformity among our different States, either as to statutory provisions on this subject, or the principles belonging to it as settled by adjudication, or the application of these principles to cases, or in the practice and usage of legislatures in relation to legislative divorces. Mr. *Bishop*, from a very full consideration of the American cases, deduces the following rules: — "1. The tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bonâ fide* domicil within its territory. Nor is this proposition at all modified by the fact that one or both of them may be temporarily residing within reach of the process of the court, or that the defendant appears and submits to the suit. This is the firmly established doctrine both in England and America." As authorities for this rule, he cites Conway *v.* Beazley, 3 Hagg. Eccl. Rep. 631; Rex *v.* Lolley, Russ. & Ry. Cr. Cas. 237; Sugden *v.* Lolley, 2 Cl. & Fin. 567, n.; Fellows *v.* Fellows, 8 N. H. 160; Hanover *v.* Turner, 14 Mass. 227; Barber *v.* Root, 10 Mass. 260; Pawling *v.* Bird, 13 Johns. 192; Jackson *v.* Jackson, 1 Johns. 424; Bradshaw *v.* Heath, 13 Wend. 407; Maguire *v.* Maguire, 7 Dana, 181; Tolen *v.* Tolen, 2 Blackf. 407; Freeman *v.* Freeman, 3 West. Law Journ. 475; White *v.* White, 5 N. H. 476. — "2. To

In this country, the law on this subject is regulated very generally by statutes; and these differ very much, and are still subject to not unfrequent change. In the absence of statutory provision, we should incline to think, that the courts would generally hold a divorce which was valid where granted, and was obtained in good faith, valid everywhere. Perhaps it may be said that the tendency of American law is towards a recognition of a divorce obtained in another State, for causes which would be sufficient ground for divorce in the State whose tribunal tries the question, but not otherwise. For the courts of each State go behind a cause of divorce in another State, so far as to inquire into the *sufficiency* of the cause; but not so far as to deny the *existence* of the cause, if ascertained by a competent tribunal, on a regularly conducted trial.

SECTION IX.

FOREIGN JUDGMENTS.

The principle that questions which have been distinctly settled by litigation shall not be again litigated, has been in

entitle the court to take jurisdiction, however, it is sufficient that one of the parties be domiciled in the country; it is not necessary that both should be, nor that the citation, when the domiciled party is plaintiff, should be served personally upon the defendant, if such personal service cannot be made." Harteau *v.* Harteau, 14 Pick. 181; Harding *v.* Alden, 9 Greenl. 140; Mansfield *v.* McIntyre, 10 Ohio, 27; Tolen *v.* Tolen, 2 Blackf. 407; Hull *v.* Hull, 2 Strobh. Eq. 174. — "3. The place where the offence was committed, whether in the country in which the suit is brought, or a foreign country, is quite immaterial. This is the universal doctrine; it is the same in the English, Scotch, and American courts, and there is no conflict upon the point. — 4. The domicil of the parties, at the time the offence was committed, is of no consequence; the jurisdiction depends upon their domicil at the time the proceeding is instituted, and judgment rendered. A contrary doctrine has been maintained in New Hampshire and Pennsylvania, in which States it is held that the tribunals of the country in which the parties were domiciled when the *delictum* occurred have alone the jurisdiction." In support of the New Hampshire and Pennsylvania rule, he cites Clark *v.* Clark, 8 N. H. 21; Frary *v.* Frary, 10 Id. 61; Smith *v.* Smith, 12 Id. 80; Greenlaw *v.* Greenlaw, Id. 200; Batchelder *v.* Batchelder, 14 Id. 380; Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Penn. St. 449. — "5. It is immaterial to this question of jurisdiction, in what country, or under what system of divorce laws, the marriage was contracted. — 6. The view we have taken is in no way controlled by that provision in the United States Constitution which prohibits the States from passing laws impairing the obligation of contracts." See Bishop on Marriage and Divorce, § 721, *et seq.*

many cases extended to foreign judgments; and although the whole law on this subject is not perhaps definitely settled, (*h*) it may be considered as the rule, both in England and in this country, that a question settled abroad, by courts of competent jurisdiction, between actual parties, after trial, will not be opened at home. (*i*) It will be presumed that all the defences the losing party has were made, and were insufficient. But it may be said that the foreign judgment will not be entitled to this respect, when it appears that the foreign law or foreign process, on which the foreign judgment rested, conflict with reason and justice; (*j*) or that the foreign court, in deciding a question depending more or less upon the law of that other country in which the foreign judgment comes under consideration, is found to have mistaken the law of that country. (*k*) And it is obviously essential to the application of the general rule, that the foreign judgment be definite, exact, final, and conclusive, in the court and country in which it was rendered. (*l*) Nor can it be necessary to say that if the foreign judgment can be shown to have been obtained by, or to be founded upon, fraud, it can have no force.

On the general ground stated above, a collection by a foreign attachment or trustee process, in a foreign country, is a bar. (*m*) So the pendency of a foreign attachment or trustee process in a foreign country may be pleaded in abate-

(*h*) Smith *v.* Nicolls, 7 Scott, 147, 167.

(*i*) Henderson *v.* Henderson, 6 Q. B. 288; Smith *v.* Lewis, 3 Johns. 157; Emory *v.* Grenough, 3 Dal. 369, 372, n. In Burrows *v.* Jemino, Str. 733, a foreign decree avoiding the acceptance of a bill of exchange was held good.

(*j*) Henderson *v.* Henderson, 6 Q. B. 288, 298; Vallee *v.* Dumergue, 4 Exch. 290; Reynolds *v.* Fenton, 3 C. B. 187; Cowan *v.* Braidwood, 12 Scott, N. R. 138; Ferguson *v.* Mahon, 11 Ad. & El. 179; Alivon *v.* Furnival, 1 C. M. & R. 277.

(*k*) Novelli *v.* Rossi, 4 B. & Ad. 757.

(*l*) Sadler *v.* Robins, 1 Campb. 253; Maule *v* Murray, 7 T. R. 407.

(*m*) Holmes *v.* Remsen, 4 Johns. Ch. 460, 20 Johns. 229; M'Daniel *v.* Hughes, 3 East, 367; Philips *v.* Hunter, 2 H. Bl. 402. In Hull *v.* Blake, 13 Mass. 153, in an action by the indorsee of a promissory note against the maker, the defendant pleaded in bar a judgment rendered against him by a county court in the State of Georgia, having jurisdiction of the cause, as the garnishee or trustee of the promisee, the defendant having in the said cause disclosed the said note; the action, in which such judgment was rendered, having been commenced after the actual indorsement of the note to the present plaintiff; and the plea was holden to be a good bar. See also the reporter's learned note to Andrews *v.* Herriot, 4 Cow. 521.

ment. (*n*) But the pendency of a suit in a foreign country, which began by process against the person, has not the same force with a foreign attachment; and will not abate a suit at home, before the foreign suit is carried to judgment. (*o*) And an action brought in this country directly on a foreign judgment, for the purpose of enforcing it, may be defeated by evidence going to set that judgment aside. Indeed, according to the weight of authority, it is no more than *primâ facie* evidence, when an action is brought to enforce it; but where an action is brought for a cause of action which was litigated abroad between the same parties, then the foreign judgment *against* such cause of action is a bar to the new action brought at home. (*p*)

(*n*) Embree *v.* Hanna, 5 Johns. 101. In this case the defendant pleaded a foreign attachment pending in Maryland for the same demand. And *Kent*, C. J., said: — "If the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending, and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there, in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt, binding upon the defendant; and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est jure.* In Brook *v.* Smith, 1 Salk. 280, Lord *Holt held* that a foreign attachment, before writ purchased in the suit, was pleadable in abatement. If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume, that if the priority of the attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated, by the subsequent act of the defendant going abroad, and subjecting himself to a suit and recovery here." And see Wheeler *v.* Raymond, 8 Cow. 311.

(*o*) Bowne *v.* Joy, 9 Johns. 221. In this case the defendant pleaded the pendency of another action, between the same parties and for the same cause, in the commonwealth of Massachusetts. And upon demurrer, judgment was given for the plaintiff. The court said: "The *exceptio rei judicatæ* applies only to final definitive sentences abroad, upon the merits of the case. Goix *v.* Law, 1 Johns. Cas. 345. Nor is this analogous to the case of the pendency of a prior foreign attachment, at the suit of a third person, for here the defendant would not be obliged to pay the money twice, since payment at least, if not a recovery, in the one suit, might be pleaded *puis darrein continuance* to the other suit; and if the two suits should even proceed *pari passu* to judgment and execution, a satisfaction of either judgment might be shown upon *audita querela*, or otherwise, in discharge of the other." In Maule *v.* Murray, 7 T. R. 470, a foreign judgment was disregarded, because it was taken subject to a case which had not then been decided, in respect to the amount.

(*p*) This distinction is distinctly stated by *Eyre*, C. J., in Philips *v.* Hunter, 2 H. Bl. 410. "It is," said he "in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the

The very first essential to this, or to any efficacy of a foreign judgment, is that the court by which it is pronounced has unquestionable jurisdiction over the case. (*q*) And if

country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences, and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *primâ facie* sufficient to raise a promise; we examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." Lord *Nottingham*, in Cottington's case, 2 Swanst. 326, n., and Lord *Hardwicke*, in Boucher *v.* Lawson, Cas. Temp. Hardw. 89, seem to hold that the foreign judgment is conclusive, for all purposes. And see Roach *v.* Garvan, 1 Ves. 157. But *Eyre's* distinction is maintained by Lord *Mansfield*, in Walker *v.* Witter, Doug. 1; and by *Buller*, J., in Galbraith *v.* Neville, Doug. 6, n. (3); and in Houlditch *v.* Donegal, 8 Bligh, 337, Lord *Brougham* gives his reasons at length for holding a foreign judgment to be only *primâ facie* evidence. And see Herbert *v.* Cook, Willes, 36, n.; Hall *v.* Odber, 11 East, 118; Bayley *v.* Edwards, 3 Swanst. 703. But Lord *Kenyon*, in Galbraith *v.* Neville, cited above, doubts whether a foreign judgment be not conclusive in English courts; and Lord *Ellenborough* at least implies a similar doubt in Tarleton *v.* Tarleton, 4 M. & S. 21; and Sir L. *Shadwell*, in Martin *v.* Nicolls, 3 Sim. 458, rejected this distinction altogether, and therefore allowed a demurrer to a bill for a discovery and a commission to examine witnesses abroad in aid of the plaintiff's defence to an action brought in England on a foreign judgment. The law on this subject cannot be considered as settled in England; but from Smith *v.* Nicolls, 5 Bing. N. C. 208, it may perhaps be inferred that in an action on a foreign judgment, the judgment is only *primâ facie* evidence. It is believed that in this country this distinction has been regarded in practice, but the reported adjudications do not authorize us to speak of it as established here. See Cummings *v.* Banks, 2 Barb. 602, where the question is discussed by *Edmonds*, J. In Boston India R. F. *v.* Hoit, 14 Verm. 92, it was *held* that debt and not assumpsit should be brought on the judgment of another State; and in Noyes *v.* Butler, 6 Barb. 613, a judgment in another State was *held* conclusive as to all facts but those which went to show the jurisdiction of the court rendering the judgment. It must be remembered, however, that the question does not stand in this country, as between the courts of the several States, in the same position in which it stands in England, as between the courts of that country and those of foreign countries, by reason of the intervention of our constitutional provisions. Judgments rendered in any State have *generally* the same force and effect in all other States as in that in which they are rendered. See, for an account of the decisions on this subject, Robinson *v.* Prescott, 4 N. H. 450; 1 Kent's Com. 260, 261. See also Downer *v.* Shaw, 2 Fost. 277.

(*q*) Buchanan *v.* Rucker, 9 East, 192; Thurber *v.* Blackbourne, 1 N. H. 242; Bissell *v.* Briggs, 9 Mass. 462; Aldrich *v.* Kinney, 4 Conn. 380; Shumway *v.* Stillman, 6 Wend. 447; Curtis *v.* Gibbs, 1 Penning. 399; Don *v.* Lippman, 5 Cl. & Fin. 120; Rogers *v.* Coleman, Hardin, 413; Borden *v.* Fitch, 15 Johns. 121; Benton *v.* Burgot, 10 S. & R. 240. And see the reporter's note to Andrews *v.* Herriot, 4 Cow. 524. From Mills *v.* Duryee, 7 Cranch, 481, apparently confirmed by Chief Justice *Marshall*, in Hampton *v.* McConnel, 3 Wheat. 234, it might seem to be the established law of this country, that a judgment recovered in one State by a citizen thereof, against a citizen of another, was absolute and final, and perfectly exclusive of all inquiry into the jurisdiction of the court which rendered the judgment. But this question was very fully considered in Bissell *v.* Briggs, 9 Mass. 462; and it was there *held* that a court of another state must have had jurisdiction of the parties, as well as of the cause, for its judgment to be entitled to the full faith and credit mentioned in the federal constitution. The same

the origin of this jurisdiction do not appear, or if it be of the ordinary kind admitted among civilized nations, and esta-

question was again fully considered in Hall *v.* Williams, 6 Pick. 232, which was debt on a judgment of the superior court in Georgia; and it was *held* that the defendant, under the plea of *nil debit*, might show that the court had no jurisdiction over his person. And *Parker*, C. J., in delivering the judgment of the court, said: — "It cannot be pretended, we think, that a citizen of Massachusetts, against whom a judgment may have been rendered in Illinois or Missouri, he never having been within a thousand miles of those States, should be compelled by our courts to execute that judgment, it not appearing by the record that he received any manner of notice that any suit was pending there against him, and being ready to show that he never had any dealings with the party who has obtained the judgment; and yet this must be the consequence, if the doctrine contended for by some is carried to its full length, viz., that the record of a judgment is to have exactly the same effect here as it would have in Illinois or Missouri; for in those States, if the process has been served according to their laws, which may be in a manner quite consistent with an utter ignorance of the suit by the party without the State, the judgment would be binding there until reversed by some proceedings recognized by their laws. If it be said that a party thus aggrieved may obtain redress by writ of error or a new trial, in the State where the judgment was rendered, it is a sufficient answer, that never having been within their jurisdiction, or amenable to their laws, he shall not be compelled to go from home to a distant State, to protect himself from a judgment which never, according to universal principles of justice, had any legal operation against him. The laws of a State do not operate, except upon its own citizens, *extra territorium;* nor does a decree or judgment of its judicial tribunals, except so far as is allowed by comity, or required by the constitution of the United States; and neither of these can be held to sanction so unjust a principle. If the States were merely foreign to each other, we have seen that a judgment in one would not be received in another as a record, but merely as evidence of debt, controvertible by the party sued upon it. By the constitution, such a judgment is to have the same effect it would have in the State where it was rendered, that is, it is to conclude as to every thing over which the court which rendered it had jurisdiction. If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there, and served with process, he is bound to appear and make his defence, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment cannot follow him beyond the territories of the State, and if it does he may treat it as a nullity, and the courts here will so treat it, when it is made to appear in a legal way that he was never a proper subject of the adjudication. These principles were settled in a most lucid and satisfactory course of reasoning by Chief Justice *Parsons*, in the opinion of the court delivered by him in the case of Bissell *v.* Briggs, 9 Mass. 462. This exposition of the constitutional provision respecting the records and judicial proceedings, authenticated as the act of Congress requires, takes a middle ground between the doctrine as held by the court of this State, in the case of Bartlett *v.* Knight, 1 Mass. 401, and by the court of New York in the case of Hitchcock et al. *v.* Aicken, 1 Caines's Rep. 460, in both of which it was *held* that the constitution and act of Congress had produced no other effect than to establish definitively the mode of authentication, leaving in other respects such judgments entirely upon the footing of foreign judgments, according to the principles of the common law. But in the case of Bissell *v.* Briggs, the principle settled is that by virtue of the provision of the constitution, and the act of legislation under it, a judgment of another State is rendered in all respects like domestic judgments, when the court where it was recovered had jurisdiction over the subject acted upon and the person against whom it was rendered, leaving open for inquiry in the court where it was sought to be enforced the question of jurisdiction, and taking the obvious distinction

blished in an authentic manner, it will be presumed to be legitimate; if, however, it be of unusual origin or character,

between the effect of the judgment upon *property* within the territory, and the *person* who was without it. It was thought that this was carrying the sanctity of judgments of other States as far as was consistent with the safety of the citizen who was not amenable to their laws, and as far as is required by the spirit or letter of the constitution of the United States. The doctrine thus established here has been approved and adopted by the courts of the great States of Pennsylvania and New York, in both of which before, it had been *held*, that the judgments of the several States were to be treated as foreign judgments. . . . . The principle upon which this exception is made to the conclusiveness in every particular of the judgments of other States, is well expressed by Mr. Justice *Johnson*, of the Supreme Court of the United States, when dissenting from the decision of the court in the case of Mills *v.* Duryee. He says it is an eternal principle of justice, 'that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits.' Indeed, so palpable is this principle, that no doubt could exist in the mind of any lawyer upon the subject, but for the construction supposed to be given to the constitution of the United States, and the act of Congress following it, in the case of Mills *v.* Duryee, 7 Cranch, 481, and re-sanctioned in the case of Hampton *v.* McConnel, 3 Wheat. 234, in the brief opinion delivered by Chief Justice *Marshall*. This construction, when first referred to in this court in the case of the Commonwealth *v.* Green, was supposed to have put an end to all questions on this subject, and to have established, as the law of the land, that a judgment recovered in one State by a citizen thereof against a citizen of another, was absolute and incontrovertible, and would admit of no inquiry, even as to the jurisdiction of the court which rendered it. This court yielded a painful deference to the decision, without that close examination it would have received if presented to them otherwise than incidentally, and if its bearing had been of importance in the case then before the court; but the notice taken of the case was merely the expression of an opinion *arguendo*, and not a judicial determination of the question. And as a further reason for not receiving the doctrine implicitly as authority, it may be remarked that the case to which it was applied was one clearly within the jurisdiction of the court which decided it, so that the point now raised was not brought into question. . . . . The case of Mills *v.* Duryee has, as its importance merited, undergone a revision in almost every State court in the Union of whose decisions we have any printed account, and the opinion has been unanimous, without the dissenting voice, so far as we can learn, of a single judge, that that case, however unqualified it may appear in the report, does not warrant the conclusion, that judgments of State courts are in all respects the same, when carried into another State to be enforced, as they are in the State wherein they are rendered, but that in all instances the jurisdiction of the court rendering the judgment may be inquired into. In truth all of them sanctioning the principles, and some of them by express reference, which were asserted by this court in the case of Bissell *v.* Briggs as the only just exposition of the provision in the constitution of the United States in relation to the records and judicial proceedings of States. . . . . With such a cloud of witnesses in favor of the construction given to the clause of the constitution which is in question, by this court in the case of Bissell *v.* Briggs, we may well rest upon that as the true construction, if it is not most clearly and explicitly overruled by the only tribunal whose authority ought to be submitted to, the Supreme Court of the United States. But notwithstanding all these decisions, many of which are subsequent in point of time to the case of Mills *v.* Duryee, and most of them commenting on it, we should be bound to give up the point, if that case settles the question as conclusively as it has been supposed it did. But all the State judges who have considered that case are of opinion that it was intended only to embrace judgments

or not yet certainly established, then its legitimacy must be proved by the party relying upon it. (*r*) It is not, however, necessary that the authority on which the jurisdiction of the tribunal rests, should be proved to be legitimate *de jure* as well as *de facto*. It is enough if it be *de facto* established, and the tribunal be commissioned by the government in which the sovereign power of the country is actually vested. (*s*)

Another essential is, that the defendant in the foreign action had such personal notice as enabled him to defend himself; or that his interests were otherwise actually and in good faith protected. (*t*) And the notice must be such as the court from which it issued has authority to give. (*u*)

It seems to be held that a plaintiff who has recovered a judgment abroad may elect to sue at home on that judgment, or on the original cause of action, because there is no merger. (*v*)

The relations between the several States of the Union are peculiar. In some respects they are held to be foreign to each other, as they are for most purposes in the law of admiralty; and in other respects not foreign, excepting so far as this is necessarily implied in their independence of each other. On this subject the Constitution of the United States declares, that "full faith and credit shall be given in each

where the defendant had been a party to the suit, by an actual appearance and defence, or at least by having been duly served with process when within the jurisdiction of the court which gave it, and they formed their opinion upon the following clause in the opinion of Mr. Justice *Story*, viz.: — 'In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State.' If this is all that was intended to be decided, the case harmonizes with the general course of decisions in the State courts as before cited, and it is in no respect different from the decision of this court in the case of Bissell *v.* Briggs." That the doctrine of the two preceding cases is now the established doctrine throughout the country, see the authorities cited at the end of the preceding note. See also Monroe *v.* Douglas, 4 Sandf. Ch. 126. In this very long and interesting case the whole doctrine of the law of foreign judgments is examined with great ability. And see Gleason *v.* Dodd, 4 Met. 333.

(*r*) Snell *v.* Foussat, 3 Binn. 239, n.; Cheriot *v.* Foussat, Id. 220.

(*s*) Bank of North America *v.* M'Call, 4 Binn. 371.

(*t*) See *ante*, p. 100, n. (*h*), and *supra*, n. (*q*).

(*u*) Therefore, where a court in Rhode Island ordered personal notice to be given a defendant in Massachusetts, which was done, it was not such a notice as would suffice for the foundation of a judgment on which an action could be maintained in Massachusetts. Ewer *v.* Coffin, 1 Cush. 23.

(*v*) Smith *v.* Nicolls, 5 Bing. N. C. 208; Hall *v.* Odber, 11 East, 118.

State to the public acts, records, and judicial proceedings of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." (*w*) In execution of this power, the first congress passed a statute, providing "that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (*x*)

In the construction of these clauses, many questions have been raised, and a great diversity of opinion manifested. The more important of these questions we have already considered in our notes.

It has been held that the provisions of the statute must be strictly complied with. Thus, it will be noticed that the records are to be attested by the seal of the court, "if there be a seal;" therefore the records of a court not having a seal may be sufficiently attested otherwise. But there is no similar phraseology as to the attestation of the clerk; that is therefore absolutely requisite; and consequently the proceedings of a court which has no clerk, as a court held by a justice of the peace, cannot be authenticated in the terms of the statute, and therefore cannot be entitled to the whole privilege which purports to be given by the clause in the constitution. (*y*)

(*w*) Art. 4, sect. 1.

(*x*) 1 U. S. Statutes at Large, p. 122, ch. xxxvii.

(*y*) This question is very fully considered in Snyder *v.* Wise, 10 Penn. St. 157; and the decision there is in accordance with the text, and with Warren *v.* Flagg, 2 Pick. 448, Robinson *v.* Prescott, 4 N. H. 450, Mahurin *v.* Bickford, 6 N. H. 567, and Silver Lake Bank *v.* Harding, 5 Ohio, 545. But, for cases which incline to an opposite opinion, see Bissell *v.* Edwards, 5 Day, 363, Starkweather *v.* Loring, 2 Verm. 573, and Blodget *v.* Jordan, 6 Verm. 580.

There remains to be considered the operation of the law of place upon the insolvent laws of this country. But these laws are, in this respect, principally influenced and affected by the clause in the constitution which forbids the several States from passing laws impairing the obligation of contracts, and we shall advert to this subject when we speak specifically of that clause.

CHAPTER III.

DEFENCES.

Sect. I. — *Payment of Money.*

1. *Of the party to whom payment should be made.*

Payment to an agent in the ordinary course of business binds the principal, unless the latter has notified the debtor beforehand that he requires the payment to be made to himself. (*z*) And sometimes a payment to the *debtor's* own agent suffices. (*a*) So payment to an attorney is as effectual as if made to the principal himself; (*b*) but not so to an

(*z*) Favenc *v.* Bennett, 11 East, 36; Hornby *v.* Lacy, 6 M. & S. 166; Drinkwater *v.* Goodwin, Cowp. 251. So if one allows an agent to trade *in his own name*, and as carrying on business for himself, payment to such agent is a bar to an action by the principal. Gardiner *v.* Davis, 2 C. & P. 49. And see Coates *v.* Lewis, 1 Campb. 444; Moore *v.* Clementson, 2 Id. 24. And in Capel *v.* Thornton, 3 C. & P. 352, it was ruled by Lord *Tenterden* that an agent authorized to sell goods has, in the absence of advice to the contrary, an implied authority to receive payment. But see Jackson *v.* Jacob, 5 Scott, 79; Blackburn *v.* Scholes, 2 Campb. 343.

(*a*) Horsfall *v.* Fauntleroy, 10 B. & Cr. 755. In this case the plaintiff, who was an importer of ivory, had caused catalogues to be circulated, stating that a quantity of ivory was to be sold on his account on a certain day by auction, subject to the condition, among others, that payment was to be made on delivery of the bills of parcels. The defendant, having received one of the catalogues, instructed his broker to purchase certain lots on his account. The broker did so, and shortly after drew bills on the defendant for the amount, which were accepted and paid at maturity. In an action by the plaintiff against the defendant for the price of the ivory, the court *held* that the payment of the bills drawn by the broker constituted a good defence, inasmuch as the plaintiff, by the condition of sale contained in his catalogues, had authorized the defendant to believe that the ivory had been paid for by the broker on delivery of the bills of parcels.

(*b*) Powell *v.* Little, 1 Wm. Bl. 8; Yates *v.* Freckleton, 2 Doug. 623; Hudson *v.* Johnson, 1 Wash. 9; Branch *v.* Burnley, 1 Call, 147. And an attorney has authority to receive payment as well after judgment has been recovered as before. Brackett *v.* Norton, 4 Conn. 517; Erwin *v.* Blake, 8 Pet. 18; Gray *v.* Wass, 1 Greenl. 257; Lewis *v.* Gamage, 1 Pick. 347. But an attorney has no authority to receive any thing but money in payment of his client's debt, nor a part in satisfaction of the whole. Savoury *v.* Chapman, 8 Dowl. 656; Jackson *v.* Bartlett, 8 Johns. 361; Kellogg *v.* Gilbert, 10 Johns. 220; Carter *v.* Talcott, 10 Verm. 471; Gullett *v.* Lewis, 3 Stewart, 23; Kirk *v.* Glover, 5 Stew. & Port. 340.

agent of the attorney appointed by the attorney to sue the debtor. (*c*) And where one contracts to do work and sues for the price, the defendant may prove that the plaintiff had a partner in the undertaking, and that he has paid that partner. (*d*) Payment to the creditor's *wife* will not be a good payment; (*e*) unless she was his agent, either expressly or by course of business. (*f*) She has no authority, *as wife*, to receipt for her husband's claims, although she be the meritorious cause. (*g*) An auctioneer or other agent employed to sell *real estate* has no implied authority to receive payment. (*h*) In case of sales by auction, the auctioneer has usually by the conditions of sale authority to receive the deposit, but not the remainder of the purchase-money. (*i*)

One may be justified in making payments to a party who is sitting in the creditor's counting-roo and apparently intrusted with the transaction of the business and authorized to receive the money, although he be not so in fact. (*j*) In general it is only a money payment that binds the principal; (*k*) so that he is not affected by any claim which the debtor may have against the agent. (*l*) And an agent au-

(*c*) Yates *v.* Freckleton, 2 Doug. 623. For an attorney at law, by virtue of his *ordinary powers*, cannot delegate his authority to another, so as to raise a privity between such third person and his principal, or to confer on him as to the principal, his own rights, duties, and obligations. Johnson *v.* Cunningham, 1 Ala. 249; Kellogg *v.* Norris, 5 Eng. [Ark.] 18. So payment to a sheriff employed by an attorney to serve a writ will not discharge the debt. Green *v.* Lowell, 3 Greenl. 373; Waite *v.* Delesdernier, 15 Maine, 144.

(*d*) Shepard *v.* Ward, 8 Wend. 542. And it is a general rule that payment to one partner is good, and binds the firm. Duff *v.* The East India Co. 15 Ves. 198; Yandes *v.* Lefavour, 2 Blackf. 371; Gregg *v* James, Breese, 107; Porter *v.* Taylor, 6 M. & S. 156; Scott *v.* Trent, 1 Wash. 77. Even after dissolution. King *v.* Smith, 4 C. & P. 108. And see Morse *v.* Bellows, 7 N. H. 568. So payment to one of two joint creditors is good, although they are not partners in business. Morrow *v.* Starke, 4 J. J. Marsh. 367.

(*e*) Offley *v.* Clay, 2 Scott, N. R. 372.

(*f*) Spencer *v.* Tisue, Addison, 316; Seaborne *v.* Blackston, 2 Freem. 178; Thrasher *v.* Tuttle, 22 Maine, 335.

(*g*) Offley *v.* Clay, *supra*.

(*h*) Mynn *v.* Joliffe, 1 Mood. & Rob. 326.

(*i*) Mynn *v.* Joliffe, *supra;* Sykes *v.* Giles, 5 M. & W. 645.

(*j*) Barrett *v.* Deere, Mood. & Malk. 200. And see Wilmott *v.* Smith, Id. 238; Moffat *v.* Parsons, 5 Taunt. 307. But payment to an apprentice not in the usual course of the creditor's business, but on a collateral transaction, has been held not to discharge the debt, although made at the creditor's counting-room. Saunderson *v.* Bell, 2 Cr. & M. 304.

(*k*) Thorold *v.* Smith, 11 Mod. 71.

(*l*) Thus, where an assured who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters, and the latter adjusted the loss by setting off in account against it a debt due from him to the underwriters for premiums, and the broker became bankrupt, and

thorized to receive payment in money cannot bind his principal by receiving goods, (*m*) or a bill or note. (*n*)

Payment by bankers to one of several persons who have jointly deposited money with them, and who are not partners, or to one of several joint trustees, does not discharge the bankers as to the others, unless they had authorized the payment. (*o*) And payment to one of two or more joint creditors of a part of the debt does not so alter the nature of the debt as to permit the other creditors to sue alone for the remainder. (*p*) But payment to one of several executors is held to be sufficient. (*q*) Whether payment to one of several assignees of a bankrupt is sufficient, may be doubtful; it seems clear that it is not, if shown to have been against the will of the co-assignees. (*r*) In general, a payment to a

never paid the money to the assured, it was *held* that the set-off in account between the underwriters and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment in money. Bartlett *v.* Pentland, 10 B. & Cr. 760.

(*m*) Howard *v.* Chapman, 4 C. & P. 508.

(*n*) Sykes *v.* Giles, 5 M. & W. 645; Ward *v.* Evans, 2 Ld. Raym. 928. And see Townsend *v.* Inglis, Holt, N. P. 278. But *quære* whether, in those States where the giving of a negotiable promissory note is regarded as *primâ facie* payment, an agent would not be authorized to receive payment by such bill or note.

(*o*) Innes *v.* Stephenson, 1 Mood. & Rob. 145. The depositors here were co-assignees of a bankrupt, and the money had been drawn out on the check of two out of three depositors, but the name of one of the two was forged. Lord *Tenterden* said "that the case was a very clear one; that money was paid to bankers by three persons, not partners in trade; that it had been stated that one of them could draw checks so as to bind the others, but that was not the law, and to allow it would defeat the very object of paying the money in jointly; and it must be well known to the jury that it was not the practice, unless the persons drawing stood in the relation of partners." And see to the same effect Stone *v.* Marsh, Ryan & Moody, 364. But this rule as to bankers is peculiar. "It is a general rule," says Mr. Justice *Maule*, "that a man may pay a debt to one of several persons with whom he has contracted jointly. In the case of a banker he cannot do so; but that arises from the particular contract which exists between him and his customer." Husband *v.* Davis, 4 Eng. Law & Eq. 342.

(*p*) Hatsall *v.* Griffith, 4 Tyrwh. 488. In this case two of three part-owners of a vessel, acting for themselves and the other part-owner, employed an agent to sell the whole vessel. He did so, and paid the two their proportion of the proceeds. The other part-owner brought an action against the agent to recover his proportion. It was *held* that he could not sue *alone*, as the agent was employed by all the owners. The case of Garret *v.* Taylor, 1 Esp. Nisi Prius, 117, *contra*, is not law. See *ante*, vol. 1, p. 29, n. But this rule does not apply in cases founded upon tort. Sedgworth *v.* Overend, 7 T. R. 279.

(*q*) "Because," says Lord *Hardwicke*, "they have each a power over the whole estate of the testator, and are considered as distinct persons." Can *v.* Read, 3 Atk. 695.

(*r*) In Can *v.* Read, *supra*, if the report is correct, Lord *Hardwicke* stated in general terms that payment to one assignee would not be a discharge without a receipt from the others also. In Smith *v.* Jameson, 1 Esp. 114, Lord *Kenyon* ruled, at Nisi Prius, that one assignee of a bankrupt estate might receive the

trustee is effectual against his *cestui que trust* at law, even in cases where it would be relieved against in equity. (*s*)

If one of several plaintiffs, or a nominal plaintiff suing for the benefit of another, discharge the debt by a collusive receipt, without payment of money, a court of law will prevent the defendant from availing himself thereof, on application by the plaintiff, made as soon as may be after a knowledge of the fraud. (*t*)

2. *Of part payment.*

It has been said that a payment of a part of a debt, or of *liquidated* damages, is no satisfaction of the whole debt, even

money belonging to the estate, and give a legal and valid discharge for it. Afterwards in Bristow *v.* Eastman, 1 Esp. 172, the same question was presented to Lord *Kenyon* again. That was an action of assumpsit for money had and received, brought by the assignees of a bankrupt. At the trial the defendant produced a receipt from one of the assignees. But upon its being shown that it had been given against the will of the co-assignee, the learned judge said, "that all the rights of property of the bankrupt centred in the assignees, and though the act of one in receiving part of the bankrupt estate might, if fairly done, bind the estate by any discharge he might give for it, that it could never be, that where one assignee had shown his express dissent that the other might give a receipt, binding on the estate; as such a construction would enable one assignee to dissipate and destroy the estate, in despite of his brother trustee." See also Williams *v.* Walsby, 4 Esp. 220; Steward *v.* Lee, Mood. & Malk. 158.

(*s*) This is because the *cestui que trust* is obliged to proceed in a court of law in the name of the trustee, and as a court of law can only consider the parties on the record, whatever is an answer as to the trustee is an answer to the action. Gibson *v.* Winter, 5 B. & Ad. 96. In modern times, however, courts of law have been in the habit of exercising an equitable jurisdiction on motion, and preventing a defendant from availing himself of such a defence unjustly. See the next note.

(*t*) Barker *v.* Richardson, 1 Y. & J. 362; Legh *v.* Legh, 1 B. & P. 447; Innell *v.* Newman, 4 B. & Ald. 419; Mountstephen *v.* Brooke, 1 Chitty, 390; Manning *v.* Cox, 7 Moore, 617; Johnson *v.* Holdsworth, 4 Dowl. P. C. 63; Payne *v.* Rogers, Doug. 407; Hickey *v.* Burt, 7 Taunt. 48; Alner *v.* George, 1 Campb. 392; Strong *v.* Strong, 2 Aikens, 373; Green *v.* Beatty, Coxe, 142. But a release from one of several plaintiffs will not be set aside, unless a clear case of fraud is made out *between the releasor and releasee.* Fraud upon the releasor alone is not a sufficient ground for calling upon the *equitable* jurisdiction of the court, since that may be replied. Wild *v.* Williams, 6 M. & W. 490. "If such a release," says Baron *Parke*, Phillips *v.* Clagett, 11 M. & W. 93, "is a fraud in point of law upon one of the parties to it, the court would not interfere; *that* is the proper subject for a replication; they can only interfere when it is a fraud on third persons, and when a court of equity would clearly set aside the release, not merely as between the parties one of whom releases, but where they would set it aside as against the defendant." So in the still later case of Rawstorne *v.* Gandell, 15 M. & W. 304, the rule was laid down that the court will not set aside a plea of a release by one of several co-plaintiffs, unless it is clearly shown to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, having no interest whatever in the subject-matter of it. — In the case of Alner *v.* George, 1 Campb. 392, Lord *Ellenborough* ruled that this equitable jurisdiction could

where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand; and a plea of payment of a small sum in satisfaction of a larger is bad even after verdict. (*u*) But this rule must be so far qualified as not to include the common case of a payment of a debt by a fair and well understood compromise, carried faithfully into effect, even though there were no release under seal. (*v*)

not be exercised by a single judge at Nisi Prius.

(*u*) Pinnel's case, 5 Rep. 117; Cumber *v.* Wane, Strange, 425; Thomas *v.* Heathorn, 2 B. & Cr. 477; Fitch *v.* Sutton, 5 East, 230; Blanchard *v.* Noyes, 3 N. H. 518; Wheeler *v.* Wheeler, 11 Verm. 60; Bailey *v.* Day, 26 Maine, 88; Down *v.* Hatcher, 10 Ad. & El. 121; Geiser *v.* Kershner, 4 Gill & Johns. 305; Watkinson *v.* Inglesby, 5 Johns. 386; Dederick *v.* Leman, 9 Johns. 333; Seymour *v.* Minturn, 17 Johns. 169. But it has been *held* that, upon a plea of payment, the acceptance of a less sum may be left to the jury as evidence that the rest has been paid. Henderson *v.* Moore, 5 Cranch, 11; Blanchard *v.* Noyes, 3 N. H. 518.—Payment of a debt alone, without the costs, made after suit brought, is not a good payment to bar the action. Costs with nominal damages may still be recovered, at least up to the time of payment. Stevens *v.* Briggs, 14 Verm. 44; Goings *v.* Mills, 1 Pike, [Ark.] 11. And see Horsburgh *v.* Ormie, 1 Campb. 558, note; Godard *v.* Benjamin, 3 Campb. 331; Goodwin *v.* Cremer, 16 Eng. Law & Eq. 90. So if two actions be commenced on a bill or note against separate parties, and the debt and costs in one suit be paid, this is not such a payment as will defeat the other action, but the plaintiff is entitled to nominal damages and costs. Randall *v.* Moon, 14 Eng. Law & Eq. 243; Goodwin *v.* Cremer, *supra*, and editor's note. But in Beaumont *v.* Greathead, 3 Dowl. & Lowndes, P. C. 631, it was *held* that payment and acceptance of the amount of a promissory note after it becomes due, and when the holder is entitled to *nominal damages*, will support a plea of payment and acceptance in discharge of the debt and damages; and that consequently the holder, after such payment and acceptance, cannot maintain an action for such *nominal damages*. And per *Maule*, J., "The point is, whether, after default on a simple contract for £50, in respect of which the defendant is liable to nominal damages, if the party accept that sum, he can afterwards sue for those nominal damages. I think he cannot. Those nominal damages, in fact, are introduced solely for a technical purpose, because the statute of Gloucester (6 Ed. 1, ch. 1, s. 2,) says "damages;" and are, in effect, only a peg to hang costs on. The creditor, for example, says, you owe me a debt of £50, and a nominal sum; the debtor thereupon takes out £50 and pays it to him, saying here is the £50 debt and the nominal sum. That nominal sum means in fact no sum at all; it is not merely an insignificant sum, but a sum which does not exist, in point of quantity, at all. It has a mere fictitious existence; and therefore, I say, a man may well receive £50 in satisfaction and discharge of a debt of £50, and nominal damages."

(*v*) Milliken *v.* Brown, 1 Rawle, 391. There a creditor of three joint debtors accepted from one of them one third of the debt with intent to exonerate him. This was held to operate as a release as to him, and therefore as to the other two also. *Huston*, J., said:—"There was a time in the history of the law, when, like every thing else of that day, it was a system of metaphysics and logic; and when the cause was decided without the slightest regard to its justice, solely on the technical accuracy of the pleaders on the several sides: defect of form in the plea was defect of right in him who used it. This period of juridical history, however, was in some respects distinguished by great men, of great learning, and abounds with information to the student. At the time I speak of, payment of debt and interest on a bond, the next day after it fell due, was no defence in a court of law; nay, it was no defence to prove payment without an acquittance before the day; nay, if you pleaded and proved a pay-

Some exceptions to the rule have always been acknowledged; as if a part be paid before all is due, (*w*) or in a way more beneficial to the creditor than that prescribed by the contracts; (*x*) here it is said there is a new consideration for the release of the whole debt. And if a stranger pay from his own money, or give his own note, for a part of a debt due from another, in consideration of a discharge of the whole, such discharge is good. (*y*)

ment, which was accepted in full of the debt, yet you failed unless your plea stated that you *paid it in full*, as well as that it was accepted in full; or perhaps because you pleaded it as a payment, when you ought to have pleaded it as an accord and satisfaction. An act of parliament or two, and the constant interference of the Court of Chancery, granting relief, have changed this in a great measure; but it is not a century since it was solemnly decided, that, if a creditor, finding his debtor in failing circumstances, and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money and paid the one half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet, if sued, he must pay the rest of the debt; for it was impossible, say the court, payment of part could be a satisfaction of the whole; but, if part was paid before the day, it was a good satisfaction of the whole. I mention this not from a general disrespect to the law or lawyers of the days I speak of, but for another purpose. It has, alas! become too common for men of good character and principles, but who trade on borrowed capital, to fail, and their creditors are glad to receive fifty cents in the dollar, and give a discharge in full; and I do not know the lawyer who would be hardy enough to deny the validity of such discharge, although given after the money was due, and although the discharge was not under seal, or although it might be doubtful whether it could more properly be called a receipt or a release, or a covenant never to sue, if the meaning can be certainly ascertained, and no fraud, concealment, or mistake at the giving it, it is effectual. It avails little, then, to go back to the last century, or further, to cite cases in which a matter was of validity or effect according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well established principle of law."

(*w*) Pinnel's case, 5 Rep. 117; Brooks *v.* White, 2 Met. 283; Smith *v.* Brown, 3 Hawks, 580.

(*x*) As if the debtor give his own *negotiable* note for part of the debt. Sibree *v.* Tripp, 15 Mees. & Welsb. 23, where the cases of Cumber *v.* Wayne, 1 Strange, 426, and Thomas *v.* Heathorn, 2 B. & C. 477, are somewhat shaken. Or if the debtor pay a part at a more convenient *place* than stipulated for in the contract, this will be a good satisfaction for the whole, if so received. Smith *v.* Brown, 3 Hawkes, 580. So if the debtor give and the creditor receive a *chattel*, in satisfaction of a whole debt, this is a good defence, although the chattel may not be of half the value of the debt. Andrew *v.* Boughey, Dyer, 75, a; Pinnel's case, 5 Rep. 117; and see Sibree *v.* Tripp, 15 M. & W. 35, *Parke*, B.; Brooks *v.* White, 2 Met. 285, 286, *Dewey*, J.; Jones *v.* Bullitt, 2 Littell, 49; Douglass *v.* White, 3 Barb. Ch. R. 621. So if the debtor render certain services, by consent of the creditor, in full payment of a debt, this is a good discharge, whatever the nature of the services. Blin *v.* Chester, 5 Day, 359. Or assign certain property. Watkinson *v.* Ingleby, 5 Johns. 386; Eaton *v.* Lincoln, 13 Mass. 424.

(*y*) Brooks *v.* White, 2 Met. 283; Boyd *v.* Hitchcock, 20 Johns. 76; Kellogg *v.* Richards, 14 Wend. 116; Le Page *v.* McCrea, 1 Wend. 164; Sanders *v.* Branch Bank, 13 Ala. 353; Lewis *v.* Jones, 4 B. & C. 506; Steinman *v.* Magnus, 11 East, 390.

If a creditor by his own act and choice compel a payment of a part of his claim by process of law, this will generally operate as an extinguishment of his whole claim, under the rule that he shall not so divide an entire cause of action as to give himself two suits upon it. (*z*) He may often bring his action for a part; but a recovery in that action bars a suit for the remainder. As if one has a demand for three articles under one contract, and sues for one, he cannot afterwards bring his action for the other two. Or if a note be given as security for a sum to be paid by instalments, and the note is sued, and judgment recovered for the instalments then due, it has been held that he cannot afterwards put the note in suit to recover the remaining instalments when they fall due. (*a*) But a second indorser may bring one action against a prior indorser for moneys paid, and a second action for moneys subsequently paid. (*b*)

3. *Of payment by letter.*

Payment is often made by letter; and the question arises, at whose risk it is when so made. This must depend upon circumstances; but in general the debtor is discharged, although the money do not reach the creditor, if he was directed or expressly authorized by the creditor so to send it, or if he can distinctly derive such authority from its being the usual course of business; but not otherwise. (*c*)

(*z*) Ingraham *v.* Hall, 11 S. & R. 78; Smith *v.* Jones, 15 Johns. 229; Farrington *v.* Payne, Id. 432; Willard *v.* Sperry, 16 Johns. 121; Phillips *v.* Berick, Id. 136. So assigning a part of his claim will not enable a creditor to subject his debtor to two suits. Ingraham *v.* Hall, 11 S. & R. 78. Nor can a creditor, after having compelled payment of a part of his claim by process of law, avail himself of the residue by way of set-off in an action against him by the other party. Miller *v.* Covent, 1 Wend. 487. And the same rule applies to torts. If a person by one and the same act convert several of the plaintiff's articles, he cannot have a separate action for each article. Farrington *v.* Payne, 15 Johns. 432. But the general rule stated in the text must be confined to cases where the claim is single and indivisible. Phillips *v.* Berick, 16 Johns. 136.

(*a*) Siddall *v.* Rawcliff, 1 M. & Rob. 263. But we should have some doubt of this; for it is every day's practice to bring actions on notes when interest is payable annually, and recover the same from year to year, although the note may not be due for many years. And indeed the above case seems to have been decided in a great measure on the ground that such a note was a fraud on the stamp acts.

(*b*) Wright *v.* Butler, 6 Wend. 284.

(*c*) Warwicke *v.* Noakes, Peake, 67.

4. *Of payment in bank-bills.*

In this country, where paper-money is in universal use, questions often arise as to payments made in that way. It seems to be settled that a payment in good bank-bills, not objected to at the time, is a good payment; and so is a tender of such bills; (*d*) but the creditor may object and de-

This was an action of assumpsit for goods sold and delivered, and money had and received. The plaintiff was a hop merchant, and the defendant his customer, living at Sherborne, in Dorsetshire. The plaintiff sold him hops, and also sold hops to several persons in that neighborhood; and requested the defendant, as his friend, to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn. Upon this evidence Lord *Kenyon* nonsuited the plaintiff, and said: — "Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since; and as the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff." And see Kington *v.* Kington, 11 M. & W. 233. In Wakefield *v.* Lithgow, 3 Mass. 249, a sheriff had allowed an execution in his hands to lie by until the return day had passed, and the creditor's attorney wrote to the sheriff, presuming he had collected the money, and requested him to send it to him by mail. At that time the sheriff had not received the money, but collecting it several months afterwards, sent it by mail to the plaintiff's attorney, to whom, however, it was never delivered. It was *held* that the sheriff was liable to the creditor, and that the money was sent at his own risk. Otherwise if the money had been sent immediately upon receipt of the attorney's letter. — When payment is to be made by letter, care should be taken that the letter is properly directed, or it will not discharge the debtor. Thus in Walter *v.* Haynes, Ry. & M. 149, a letter was put into the office directed to "Mr. Haynes, Bristol," and this was held to be insufficient. And, per *Abbott*, C. J.: "Where a letter fully and particularly directed to a person at his usual place of residence is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person; because it is a safe and reasonable presumption that it reaches its destination; but where a letter is addressed generally to A. B. at a large town, as in the present case, it is not to be absolutely presumed, from the fact of its having been put into the post-office, that it was ever received by the party for whom it was intended. The name may be unknown at the post-office, or if the name be known, there may be several persons to whom so general an address would apply. It is therefore always necessary, in the latter case, to give some further evidence to show that the letter did in fact come to the hands of the person for whom it was intended." See also Gordon *v.* Strange, 1 Exch. 477. So in the case of Hawkins *v.* Rutt, Peake, 186, Lord *Kenyon* ruled that a person remitting money by the post should deliver the letter at the general post-office, or at a receiving house appointed by that office, and that a delivery to a bell-man in the street was not sufficient.

(*d*) Snow *v.* Perry, 9 Pick. 542; Warren *v.* Mains, 7 Johns. 476; Wheeler *v.* Kraggs, 8 Ohio, 169; Hoyt *v.* Byrnes, 2 Fairf. 475; Tiley *v.* Courtier, 2 Cr. & J. 16, n.; Wright *v.* Reed, 3 T. R. 534; Ball *v.* Stanley, 5 Yerger, 199; Polgloss *v.* Oliver, 2 Cr. & J. 15; Brown

mand specie. (*e*) If the bills are forged, both in England and in this country, the payee may treat them as a nullity, for such bills are not what they purport to be. (*f*) But if the bills are true and genuine, the responsibility of the solvency of the bank would seem from some cases to rest upon the payee. (*g*) But if the debtor knew of the insolvency, and did not disclose it, or if he might have known it, and his ignorance was the result of his negligence, he certainly is not discharged by such payment. (*h*) And the majority of our cases appear to take the ground that where bills of a bank that has failed are paid and received in ignorance of such failure, the loss falls on the party paying; putting such bills on the same footing as forged bills, and as equally a nullity. (*i*) But if such a rule were adopted, it would un-

v. Saul, 4 Esp. 267; Noe *v.* Hodges, 3 Humph. 162; Seawell *v.* Henry, 6 Ala. 226.

(*e*) Coxe *v.* State Bank, 3 Halst. 72; Moody *v.* Mahurin, 4 N. H. 296; Donaldson *v.* Benton, 4 Dev. & Bat. 435. And a legal tender cannot be made in copper cents under the Constitution of the United States. M'Clarin *v.* Nesbit, 2 N. & M'Cord, 519.

(*f*) United States Bank *v.* Bank of Georgia, 10 Wheat. 333; Markle *v.* Hatfield, 2 Johns. 455; Thomas *v.* Todd, 6 Hill, 340; Hargrave *v.* Dusenberry, 2 Hawks, 326; Anderson *v.* Hawkins, 3 Hawks, 568; Pindall *v.* The Northwestern Bank, 7 Leigh, 617; Mudd *v.* Reeves, 2 Harr. & Johns. 368; Wilson *v.* Alexander, 3 Seam. 392; Eagle Bank *v.* Smith, 5 Conn. 71; Young *v.* Adams, 6 Mass. 182; Sims *v.* Clarke, 11 Ill. 137; Ramsdale *v.* Horton, 3 Barr, 330; Keene *v.* Thompson, 4 Gill & Johns. 463. See also *ante*, vol. 1, p. 220. But such forged notes (and the same applies to forged coin) must be returned by the receiver in a reasonable time, or he must bear the loss. Pindall *v.* The Northwestern Bank, 7 Leigh, 617; Sims *v.* Clarke, 11 Ill. 137. But payment made to a bank, *bonâ fide*, in its own notes, which are received as genuine, but afterwards ascertained to be forged, is good, and the bank must bear the loss. See *ante*, vol. 1, p. 220. This seems to be on the ground that the bank, or its officers, having superior means of determining the genuineness of their own bills, are guilty of negligence in receiving them without examination. — But payment to a bank by its own notes, which have been stolen from such bank, is no payment. State Bank *v.* Welles, 3 Pick. 394.

(*g*) Lowrell *v.* Morrell, 2 Porter, 280; Bayard *v.* Shunk, 1 Watts & Serg. 92; Scruggs *v.* Gass, 8 Yerg. 175. Perhaps these cases rest upon the ground that the identical bills given and received were received as payment, *per se*, whether they were good or bad. *Possibly* also, there may be a difference between bills received in payment of an antecedent debt and bills passed in payment at the time of a purchase. In the latter case, perhaps, the doctrine of *caveat emptor* applies to the receiver of the bills, as well as to the purchaser of the goods. *Sed quære.*

(*h*) See Commonwealth *v.* Stone, 4 Met. 43.

(*i*) Wainwright *v.* Webster, 11 Verm. 576; Gilman *v.* Peck, Id. 516; Fogg *v.* Sawyer, 9 N. H. 365; Frontier Bank *v.* Morse, 22 Maine, 88; Lightbody *v.* Ontario Bank, 11 Wend. 1, 13 Wend. 101. See also *ante*, vol. 1, p. 220. In Timmis *v.* Gibbins, 14 Eng. Law & Eq. 64, M. W. deposited certain country banknotes, payable in London, representing £80 in value, with a banking company, and received the following memorandum, signed by the manager: — "Received of M. W. £80, for which we are accountable. £80, at 3 per cent. interest, with fourteen days notice." The

doubtedly be so far qualified, that where both parties were entirely and equally ignorant, and the creditors by receiving and retaining the bills without notice, deprived the debtor of any remedy or indemnity he might have, the debtor is then discharged. (*j*)

5. *Of payment by check.*

Payment is also often made by the debtor's check upon a bank. A check is a draft, and the law of bills and notes is generally applicable to it. If given in the ordinary course of business, and unattended by especial circumstances, it is not presumed to be received as absolute payment, even if the drawer have funds in the bank. The holder is not bound by receiving it, but may treat it as a nullity if he derives no benefit from it, provided he has been guilty of no negligence which has caused an injury to the drawer. (*k*) Nor is it necessary to preserve the payee's rights that it should be presented on the day on which it is received. (*l*) And if

notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were transmitted by that night's post to the banking company, who on the following day gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the company were then aware of this. It was *held* that, under the above circumstances, M. W. could not maintain an action, either for money lent, or for money had and received, against the banking company.

(*j*) Thus, where a banking company paid notes, on which the name of the president had been forged, and neglected for fifteen days to return them, it was *held* that they had lost their remedy against the person from whom the notes had been received. Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

(*k*) Cromwell *v.* Lovett, 1 Hall. 56. The holder of the check in such a case becomes the agent of the drawer to collect the money. And certainly if the check is conditional, as if it is stated to be for the "balance due" the creditor, this would be no payment, and the creditor need not return it before commencing suit on the original cause of action. Hough *v.* May, 4 Ad. & Ell. 954. And if a creditor is offered either cash, in payment of his debt, or a check of the debtor's agent, and he prefers the latter, this does not discharge the debt if the check is not paid; although such agent afterwards fails with a large balance of the debtor's funds in his hands; for the check of the agent is considered, in such a case, as the check of the principal debtor. Everett *v.* Collins, 2 Campb. 515. See also Tapley *v.* Martens, 8 T. R. 451; Bolton *v.* Richards, 6 T. R. 139; Brown *v.* Kewley, 2 B. & P. 518.

(*l*) The Merchants Bank *v.* Spicer, 6 Wend. 443; Robson *v.* Bennett, 2 Taunt. 396; Richford *v.* Ridge, 2 Campb. 537; Gough *v.* Staats, 13 Wend. 549. Checks are considered as inland bills of exchange, and the holder must use the same diligence in present-

drawn on a bank in which the drawer has no funds, it need not be presented at all in order to sustain an action upon it. (*m*) The drawing of such a check knowingly is a fraud, and deprives the drawer of all right of presentation or demand.

6. *Of payment by note.*

Payment is also often made by the debtor's giving his own negotiable promissory note for the amount. In Massachusetts, such note is said in some cases to be an absolute payment and a discharge of the debt. (*n*) It is said that this rule has prevailed in that State from colonial times; and it rests upon the danger which the promisor would be under of being obliged to pay the note to an innocent indorsee, after he had paid the sum due on a suit brought by his creditor on the original contract. But most of the cases in Massachusetts treat it only as a presumption of payment, in the absence of circumstances going to show an opposite intention. (*o*) And the same rule is recognized in Maine. (*p*) But even in this the law in those States differs from the rule as held in the courts of the United States, and of the State courts generally. There it is held that a negotiable promissory note is not payment, unless circumstances show that such was the intention of the parties. (*q*)

ing them for payment as the holder of such bill. *Marcy*, J., in Bank *v.* Spicer, 6 Wend. 443.

(*m*) Franklin *v.* Vanderpool, 1 Hall, 78.

(*n*) Thacher *v.* Dinsmore, 8 Mass. 299; Whitcomb *v.* Williams, 4 Pick. 228.

(*o*) Watkins *v.* Hill, 8 Pick. 522; Reed *v.* Upton, 10 Id. 525; Mancely *v.* McGee, 6 Mass. 143; Wood *v.* Bodwell, 12 Pick. 268; Ilsley *v.* Jewett, 2 Metc. 168. This presumption is but *primâ facie*, and may be rebutted by proof of a different intent. Butts *v.* Dean, 2 Metc. 76. And the fact that taking such note as payment would deprive the party taking it of a substantial benefit, or where he has other security for the payment, has a strong tendency to show that the note was not intended as payment. Curtis *v.* Hubbard, 9 Metc. 328. And see Thurston *v.* Blanchard, 22 Pick. 18; Melledge *v.* Boston Iron Company, (not yet reported.)

(*p*) Varner *v.* Nobleborough, 2 Greenl. (Bennett's ed.) 121, and note *a*; Descadillas *v.* Harris, 8 Greenl. 298; Newall *v.* Hussey, 18 Maine, 349; Bangor *v.* Warren, 34 Maine, 324; Fowler *v.* Ludwig, Id. 455; Shumway *v.* Reed, Id. 560; Gilmore *v.* Bussey, 3 Fairf. 418; Comstock *v.* Smith, 23 Maine, 202. But this rule never applies to notes not *negotiable*. Trustees, &c. *v.* Kendrick, 3 Fairf. 381; Edmond *v.* Caldwell, 15 Maine, 340.

(*q*) Peter *v.* Beverly, 10 Pet. 567; Sheehy *v.* Mandeville, 6 Cranch, 253; Wallace *v.* Agry, 4 Mason, 336; Van Ostrand *v.* Reed, 1 Wend. 424; Bur-

7. Of payment by delegation.

Payment may be made by an arrangement whereby a credit is given or funds supplied by a third party to the creditor, at the instance of the debtor. But such an arrangement must be carried into actual effect to have all the force of payment; and, in general, it may be compared with the delegation of the civil law. Thus, where a debtor directed his bankers to place to the credit of the creditor, who was also a customer of the bankers, such a sum as would be equal to a bill at one month, and the bankers agreed so to do, and so said to the creditor who assented to the arrangement, and the bankers became bankrupt before the day on which the credit was to be given, this was held to be no payment, and the creditor was permitted to maintain an action against the original debtor on the original liability. (*r*) It would doubtless have been otherwise had there been a remittance or actual transfer on account of the debt; for it seems to be settled that the actual transfer of the amount of the debt in a banker's books, from the debtor to the creditor, with the knowledge and assent of both, is equivalent to payment. (*s*) Where bankers receive funds from a debtor, to be by them transmitted

dick *v.* Green, 15 Johns. 247; Hughes *v.* Wheeler, 8 Cow. 77; Booth *v.* Smith, 3 Wend. 66; Bill *v.* Porter, 9 Conn. 23; Davidson *v.* Bridgeport, 8 Conn. 472; Elliott *v.* Green, 2 N. H. 525.

(*r*) Pedder *v.* Watt, Peake's Add. Cas. 41.

(*s*) Eyles *v.* Ellis, 4 Bing. 112. This was an action of covenant for rent due from the defendant to the plaintiff. At the trial before *Onslow*, Sergt., it appeared that the plaintiff, in October, authorized the defendant to pay in at a certain banker's the amount due. Owing to a mistake it was not then paid; but the defendant, who kept an account with the same bankers, transferred the sum to the plaintiff's credit on Friday, the 9th of December. The plaintiff, being at a distance, did not receive notice of this transfer till the Sunday following, and on the Saturday the bankers failed. The learned sergeant thought that this transfer amounted, under the circumstances, to payment. And this ruling was sustained by the Court of Common Pleas on a motion for a new trial. *Best*, C. J., said: — "The learned Sergeant was right in esteeming this a payment. The plaintiff had made the Maidstone bankers his agents, and had authorized them to receive the money due from the defendant. Was it then paid, or was that done which was equivalent to payment? At first, not; but on the 8th a sum was actually placed to the plaintiff's account; and though no money was transferred in specie, that was an acknowledgment from the bankers that they had received the amount from Ellis. The plaintiff might then have drawn for it, and the bankers could not have refused his draft." See also Bodenham *v.* Purchas, 2 B. & Ald. 39, and *ante*, vol. I, pp. 187 – 191.

through their foreign correspondents to a foreign creditor, it seems that the bankers are not liable if they pass it to the credit of their foreign correspondents, and give notice to them to pay it over to the creditor, and afterwards accept bills drawn on them by the foreign correspondents, although the foreign correspondents become bankrupts before the notice reaches them, and do not transmit the money to the creditor. (*t*) The rule seems to rest on the fact that the bankers had done all that was to be expected of them, and all that they had undertaken to do.

8. *Of stake-holders, and wagers.*

Payment is sometimes made to a third party, to hold until some question be determined, or some right ascertained. The third party is then a stake-holder, and questions have arisen as to his rights and duties, and as to the rights of the several parties claiming the money. If it be deposited with him to abide the result of a wager, it seems that where the wager is legal, neither party to it can claim the money until the wager is determined, and then he is bound to pay it to the winning party. (*u*) That is, neither party can rescind

(*t*) M'Carthy *v.* Colvin, 9 Ad. & Ell. 607.

(*u*) Brandon *v.* Hibbert, 4 Campb. 37. There the plaintiff laid a wager with a butcher that another butcher would sell him meat at a certain price. The wager was accepted, and the money placed in the defendant's hands, and the decision of the question was left to him, and he decided against the plaintiff, who then brought this action to recover his deposit, but *Dampier*, J., was of opinion that the action could not be maintained, and directed a nonsuit. In Brand *v.* Collett, Id. 157, the plaintiff, in the presence of the defendant and one Porter, boasted of having conversed with Lord Kensington. Porter asserted that the plaintiff had never spoken to Lord Kensington in his life. A bet was talked of upon the subject, but none was then laid. Next morning the parties again met, when Porter asked, "What will you now lay that you conversed with Lord Kensington?" The plaintiff answered, "80 guineas to 10." The money was accordingly deposited in the hands of the defendant, as a stake-holder. Upon which Porter exclaimed, "Now I have you; I have made inquiries, and the person you conversed with was Lord Kingston, not Lord Kensington." The plaintiff owned his mistake; but said he had been imposed upon, and gave notice to the defendant not to pay over the money. This action was brought to recover back the deposit of eighty guineas, on the ground that it was a bubble bet. But per *Gibbs*, C. J.:—"I think the action cannot be maintained. There is nothing illegal in the wager. Nor can it be said that the point was certain as to one party, and contingent as to the other. The plaintiff relied upon his own observation, Porter upon the in-

the agreement; although Lord *Ellenborough* said otherwise, in one case. (*v*) If the wager be illegal, either party may claim the money. If the loser claim money he has deposited on an illegal wager, and claim it even after the wager is decided against him, but before it is actually paid over, the stake-holder is bound to return it to him. (*w*) But although the wager be illegal, if the stake-holder has paid it over to the winner, before notice or demand against him by the loser, he is exonerated. (*x*) When the event has been determined, it is said that the winner may bring an action for the money against the stake-holder, without giving him notice of the happening of the event. (*y*)

The statute 8 & 9 Vict., ch. 109, s. 18, makes all wagers, or contracts or agreements by way of gaming or wagering, null and void, and provides that no suit shall be maintained for the recovery of any thing deposited to abide the event of any wager. Many of the courts of this country have viewed wagers as entitled to no favor; (*z*) but where they are in any degree legal contracts, they would doubtless be governed by the rules above stated.

An auctioneer is often made a stake-holder; and where he receives a deposit from a purchaser, to be paid over to the seller, if a good title to the property be made out, and in default thereof to be returned to the purchaser, he cannot return it to the purchaser on his demand, without such default. But on default, or a rescinding or abandonment

formation he had received. The former was the more confident of the two; and either might have turned out to have been mistaken."

(*v*) Eltham *v.* Kingsman, 1 B. & Ald. 683. This was an action against a stake-holder to recover back a wager. Lord *Ellenborough* said: — "I think there is no distinction between the situation of an arbitrator and that of the present defendant, for he is to decide who is the winner and who is the loser of the wager, and what is to be done with the stake deposited in his hand. Now an arbitrator's authority before he has made his award is clearly countermandable; and here, before there has been a decision, the party has countermanded the authority of the stake-holder." This position, however, was strongly doubted in the subsequent case of Marryat *v.* Broderick, 2 M. & W. 369.

(*w*) Cotton *v.* Thurland, 5 T. R. 405; Smith *v.* Bickmore, 4 Taunt. 474; Bate *v.* Cartwright, 7 Price, 540; Hastelow *v.* Jackson, 8 B. & C. 221; Hodson *v.* Terrill, 1 Cr. & Mees. 797.

(*x*) Perkins *v.* Eaton, 3 N. H. 152; Howson *v.* Hancock, 8 T. R. 575; McCullum *v.* Gourlay, 8 Johns. 147; Livingston *v.* Wootan, 1 N. & McC. 178.

(*y*) Duncan *v.* Cafe, 2 M. & W. 244.

(*z*) Perkins *v.* Eaton, 3 N. H. 152; Bunn *v.* Riker, 4 Johns. 426; McAllister *v.* Hoffman, 16 S. & R. 147; McAllister *v.* Gallaher, 3 Penn. 468; Wheeler *v.* Spencer, 15 Conn. 28.

of the contract, the auctioneer is bound to return it to the purchaser on his demand, and if he have paid it to the owner of the property, he has done so in his own wrong, and must refund it to the depositor. (*a*) If one deposits money in the hands of a stake-holder, to be paid to a creditor when his claim against the depositor shall be ascertained, and the stake-holder pays this money to the creditor on his giving an indemnity, before the claim is ascertained, without the assent of the depositor, it is said that such depositor may maintain an action against the stake-holder for money had and received, without any reference to the demand of the creditor. (*b*) But if the check of the depositor be given to the stake-holder, the mere fact that he cashes it and holds the money is not such wrongdoing as makes him liable to be sued for the amount. (*c*)

9. *Of appropriation of payments.*

There are many cases relating to the appropriation of a payment, where the creditor has distinct accounts against the debtor. In Cremer *v.* Higginson, (*d*) Mr. Justice *Story* lays down with much precision the general rules governing these cases. First, a debtor who owes his creditor money on distinct accounts may direct his payments to be applied

(*a*) Edwards *v.* Hodding, 5 Taunt. 815. In Duncan *v.* Cafe, 2 M. & W. 244, the plaintiff having deposited a sum with the auctioneer, until a good title was made out, was allowed to recover the deposit, without notice to the auctioneer that the contract had been rescinded by the parties. And see, to the same effect, Gray *v.* Gutteridge, 1 Man. & Ryl. 614.

(*b*) Cowling *v.* Beachum, 7 Moore, 465. In this case the plaintiff had employed one Langdon, an auctioneer, to sell an estate, and disputed the sum charged by him for his expenses; whereupon it was agreed that the amount should be deposited with the defendant, until it should be ascertained whether the auctioneer was entitled to the whole of his demand or not. The defendant having paid over the amount so deposited to the auctioneer on receiving his indemnity, without the knowledge or concurrence of the plaintiff, it was *held* that the latter was entitled to recover it back in an action for money had and received. And, per *Burrough*, J., "The sum in question was deposited by the plaintiff with the defendant for an express purpose; it should, therefore, have remained in his hands until it was ascertained to what remuneration Langdon was entitled for selling the estate in question. The payment of it by him to Langdon, on his indemnity, was a wrongful act, and a breach of the trust reposed in the defendant by the plaintiff, and for which the sum in question was deposited in his hands, and which he cannot now possibly comply with, in consequence of his own act."

(*c*) Wilkinson *v.* Godefroy, 9 Ad. & El. 536.

(*d*) 1 Mason, 338.

to either, as he pleases. Second, if the debtor makes no such appropriation, the creditor may apply the money as he pleases. Third, if neither party makes a specific appropriation of the money, the law will appropriate it as the justice and equity of the case may require. These rules seem to apply although one of the debts be due on specialty and the other on simple contract. (*e*) If one owe money in respect of a debt contracted by his wife before marriage, and also a debt of his own, and pay money generally, the creditor may apply the payment to either demand. (*f*) And if one of the debts be barred by the statute of limitations, and the other not, and the money be paid generally, the creditor may apply the payment to the debt that is barred; (*g*) but he may not make use of this payment to revive the debt and remove the bar of the statute. (*h*)

It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for

(*e*) Brazier *v.* Bryant, 2 Dowl. P. C. 477; Chitty *v.* Naish, Id. 511; The Mayor, &c. of Alexandria *v.* Patten, 4 Cranch, 317; Peters *v.* Anderson, 5 Taunt. 596; Hamilton *v.* Benbury, 2 Haywood, 385.

(*f*) Goddard *v.* Cox, 2 Strange, 1194. In this case the defendant was indebted to the plaintiff on account of debts contracted by his wife *dum sola*, and also on account of debts contracted by himself. His wife was also indebted to the plaintiff as executrix. The defendant made payments to the plaintiff on account generally, without directing what debts they should be applied to. *Held*, that the plaintiff might elect whether to apply the payments to discharge the debts contracted by the defendant himself, or those contracted by his wife *dum sola*, but could not apply them to discharge the debts due from the wife as executrix.

(*g*) Mills *v.* Fowkes, 5 Bing. N. C. 455. In this case *Tindal*, C. J., said: "The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment; *solvitur in modum solventis;* if he omit to do so, the creditor may make the appropriation; *recipitur in modum recipientis;* but if neither make any appropriation, the law appropriates the payment to the earlier debt." See also Williams *v.* Griffith, 5 M. & W. 300; Logan *v.* Mason, 6 W. & S. 9. But if a creditor has several claims, some of which are illegal, and so not by law recoverable, he cannot appropriate a general payment to such illegal claims. Caldwell *v.* Wentworth, 14 N. H. 431; Wright *v.* Laing, 3 B. & C. 165; Arnold *v.* The Mayor, &c. of Poole, 4 M. & Gr. 860; *Ex parte* Randleson, 2 Dea. & Chit. 534. But see, *contra*, Philpott *v.* Jones, 2 Ad. & El. 41; Cruickshanks *v.* Rose, 1 Mood. & Rob. 100; Treadwell *v.* Moore, 34 Maine, 112.

(*h*) Mills *v.* Fowkes, 5 Bing. N. C. 455. But the case of Ayer *v.* Hawkins, 19 Verm. 26, shows that a creditor having *several* notes against his debtor, all of which are barred by the statute of limitations, may appropriate a general payment of such debtor to any *one* of the notes, even the largest, and revive that particular note, but he cannot *distribute* such general payment upon all his claims, and thus avoid the statute as to all

if his intention and purpose can be clearly gathered from the circumstances of the case, the creditor is bound by it. (*i*) If the debtor, at the time of making a payment, makes also an entry in his own book, stating the payment to be on a particular account, and *shows the entry to the creditor*, this is a sufficient appropriation by the debtor. (*j*) But the right of election, or appropriation, is not exercised by entries in the books of either party until those entries are communicated to the other party. (*k*)

Although the payment be general, the creditor is not allowed in all cases to appropriate the same. As where he has an account against the debtor in his own right, and another against him as executor, and money is paid by the debtor without appropriation, the creditor must apply it to the personal debt of the debtor, and not to his debt as executor. (*l*)

A general payment must be applied to a prior legal debt, in preference to a subsequent equitable claim. (*m*) If the equitable claim be prior, it has been said that it may be preferred by the creditor; (*n*) but this does not seem to be certain. (*o*)

(*i*) The question is always one of intent, which is a question for the jury under all the circumstances of the case. As to what circumstances will be held sufficient to warrant a finding of such appropriation by the debtor, see Tayloe *v.* Sandiford, 7 Wheat. 14; Mitchell *v.* Dall, 2 Harr. & Gill, 159, 4 Gill & Johns. 361; Fowke *v.* Bowie, 4 Harr. & Johns. 566; Robert *v.* Garnie, 3 Caines, 14; West Branch Bank *v.* Moorehead, 5 W. & S. 542; Scott *v.* Fisher, 4 Monr. 387; Stone *v.* Seymour, 15 Wend. 19; Newmarch *v.* Clay, 14 East, 339; Shaw *v.* Picton, 4 B. & C. 715. If the debtor pay with one intent, and the creditor receive with another, the intent of the debtor shall govern. Reed *v.* Boardman, 20 Pick. 441.

(*j*) Frazer *v.* Bunn, 8 C. & P. 704.

(*k*) Simpson *v.* Ingham, 2 B. & C. 65.

(*l*) Goddard *v.* Cox, 2 Strange, 1194. And see Fowke *v.* Bowie, 4 H. & Johns. 566; Sawyer *v.* Tappan, 14 N. H. 352. But where one debt is due to the creditor in his own right, and another to him as trustee or agent for another, and neither is secured, the creditor cannot apply the whole of a general payment to his own debt, but must apply it *pro rata* to both debts; for this is a part of his duty as trustee, to take the same care of the debts of his *cestui que trust* as of his own. See Scott *v.* Ray, 18 Pick. 361; Barrett *v.* Lewis, 2 Id. 123; Cole *v.* Trull, 9 Id. 325.

(*m*) Goddard *v.* Hodges, 1 Cr. & Mees. 33.

(*n*) Bosanquet *v.* Wray, 6 Taunt. 597.

(*o*) In Birch *v.* Tebbutt, 2 Starkie, 74, A. had certain bills of exchange accepted by B., and also a mortgage executed by B. to a third person, but of which A. might compel an assignment in equity to himself. B. paid A. money *on account*, which A. received without prejudice to the claim he might have upon any securities. Lord *Ellenborough held* that the money should be applied wholly towards the bills of exchange, and none on the equitable claims.

In general, the creditor's right of appropriation, springing from the neglect or refusal of the debtor to make such appropriation, exists only where the debtor has in fact an opportunity of making it; and not where the payment was made on his account by another, or in any way which prevents or impedes his exercise of the right of election. (*p*)

Several rules may be gathered from the cases, by which courts are guided where the appropriation or application of payments is made by the law. Thus, the money is applied to the case of the most precarious security, where there is nothing to control this application. (*q*) But if one debt be a mortgage debt, and the other a simple account, it has been said the court will apply the money to the mortgage debt in preference, on the ground that it will be more for the interest of the debtor to have this debt discharged. (*r*) And if there be two demands, of different amounts, and the sum paid will exactly satisfy one of them, it will be considered as intended to discharge that one. (*s*) If one of the debtor's liabilities be contingent, as where the creditor is his indorser or surety, but has not yet paid money for him, the court will apply a general payment to the certain debt, and will not permit the creditor to apply it to the contingent debt. (*t*)

If a partner in a firm owe a private debt to one who is

(*p*) Waller *v.* Lacy, 1 Man. & Gr. 54. Here an attorney having several demands against his client, some of which were barred by the statute of limitations, and some not, received from a third person a sum of money on behalf of his client, and claimed the right to apply such sum to the payment of the earliest items in his own account against the client; but the court *held* that he had no such right.

(*q*) See Field *v.* Holland, 6 Cranch, 8; Plomer *v.* Long, 1 Starkie, 153; Smith *v.* Loyd, 11 Leigh, 512; Stamford Bank *v.* Benedict, 15 Conn. 438; Vance *v.* Monroe, 4 Gratt. 53.

(*r*) Pattison *v.* Hall, 9 Cowen, 747, 765. And see Dorsey *v.* Gassaway, 2 Harr. & Johns. 402; Gwinn *v.* Whitaker, 1 Harr. & Johns. 754; Robinson *v.* Doolittle, 12 Verm. 246; Anonymous, 12 Mod. 559. But see, *contra*, Anonymous, 8 Mod. 236; Chitty *v.* Naish, 2 Dowl. 511; Field *v.* Holland, *supra*; Planters Bank *v.* Stockman, 1 Freeman's Ch. [Miss.] 502; Hilton *v.* Burley, 2 N. H. 193; Jones *v.* Kilgore, 2 Rich. Eq. 64; Moss *v.* Adams, 4 Ired. Eq. 42; Ramsour *v.* Thomas, 10 Ired. 165.

(*s*) Robert *v.* Garnie, 3 Caines, 14.

(*t*) Niagara Bank *v.* Rosevelt, 9 Cowen, 410; Newman *v.* Meek. 1 Sm. & Mar. Ch. 331; Portland Bank *v.* Brown, 22 Maine, 295. So a general payment is to be referred to a debt due, rather than to one not yet due. Seymour *v.* Sexton, 10 Watts, 255; Hammersley *v.* Knowlys, 2 Esp. 666; Bacon *v.* Brown, 1 Bibb, 334; Stone *v.* Seymour, 15 Wend. 19; Baker *v.* Stackpoole, 9 Cow. 420; McDowell *v.* The Blackstone Canal Co. 5 Mason, 11. But by express agreement, a payment may be applied to a debt not yet due. Shaw *v.* Pratt, 22 Pick. 305.

also a creditor of the firm, and make to this creditor a general payment, but of money belonging to the firm, the payment must be appropriated to the discharge of the partnership debt. (*u*)

It seems to be settled, that where one of several partners dies, the firm being in debt, and the surviving partners continue their dealings with a particular creditor, and the latter blends his transactions with the firm before and after such death together, the payments made from time to time by the surviving partners must be applied to the old debt. (*v*) It will be presumed that all the parties have agreed and intend to consider the whole transaction as continuous, and the entire account as one account. (*w*) And in general, the doctrine of appropriation, and the right of election, apply only where the debts or accounts are distinct in themselves, and are so regarded and treated by the parties. Where the whole may be taken as one continuous account, payments are, generally, but not universally, applied to the earlier items of the account. (*x*)

(*u*) Thompson *v.* Brown, M. & Malk. 40. And, per *Abbott*, C. J.: — "The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others." And see Fairchild *v.* Holly, 10 Conn. 175; Johnson *v.* Boone, 2 Harring. 172; Sneed *v.* Weister, 2 A. K. Marsh. 277.

(*v*) Per *Bayley*, J., in Simson *v.* Ingham, 2 B. & Cr. 65. And see, to the same effect, Clayton's case, (Devaynes *v.* Noble) 1 Mer. 529, 604; Timson *v.* Cooke, 1 Bing. 452; Williams *v.* Rawlinson, 4 Id. 71; Bodenham *v.* Purchas, 2 B. & Ald. 39; Toulmin *v.* Copland, 3 Y. & Col. 625, 1 West, 164; Smith *v.* Wigley, 3 M. & Scott, 174. But if a new account is opened with the new firm, the creditor may apply a general payment to the new account. Logan *v.* Mason, 6 Watts & Serg. 9.

(*w*) Per *Bayley*, J., in Simson *v.* Ingham, 2 B. & Cr. 65.

(*x*) Clayton's case, (Devaynes *v.* Noble) 1 Mer. 529, 609. This is the leading case upon this point. See also Brooke *v.* Enderby, 2 Br. & Bing. 70; United States *v.* Kirkpatrick, 9 Wheat. 720; Jones *v.* United States, 7 How. 681; Postmaster-General *v.* Furber, 4 Mason, 333; United States *v.* Wardwell, 5 Mason, 82; Gass *v.* Stinson, 3 Sumner, 98; Fairchild *v.* Holly, 10 Conn. 175; McKenzie *v.* Nevins, 22 Maine, 138; United States *v.* Bradbury, Davcis, 146. See also cases cited in preceding note. But payment will not be applied to the earliest items in an account, if a different intention is clearly expressed by the debtor, or by both parties, or where such intention can be gathered from the particular circumstances of the case. See Taylor *v.* Kymer, 3 B. & Ad. 320; Henniker *v.* Wigg, 4 Q. B. 792; Capen *v.* Alden, 5 Metc. 268; Dulles *v.* De Forest, 19 Conn. 191; Wilson *v.* Hirst, 1 N. & Man. 742.

The due exercise of the right of appropriation by the creditor may often be of great importance to the surety of the debtor. Generally the law favors the surety, especially if his suretyship be not for a previously existing debt. So where one has given security for the payment for goods to be afterwards supplied to his principal, and such goods are supplied, and general payments made by the principal, who was otherwise indebted to the party supplying the goods, it would be inferred in favor of the surety that the payments were intended to be made in liquidation of the account which he had guaranteed. (*y*) But where an obligor makes a general payment to his obligee, to whom he is indebted not only on the bond but otherwise, the surety of the obligor cannot require that the payment should be applied to the bond, unless aided by circumstances which show that such application was intended by the obligor. (*z*)

(*y*) Marryatts *v.* White, 2 Stark, 101. In this case a son-in-law of the defendant being indebted to the plaintiff, and wishing to obtain a farther credit for some flour, the defendant became his surety by giving his note to the plaintiff, but with a stipulation that it should operate as a security for the flour to be delivered, and not for the debt which then existed. The term of credit on sales of flour was three months, and discount was allowed for earlier payment. After the delivery of the flour the son-in-law made several payments on account generally, but upon all those which were made within three months from the time the flour was delivered, the usual discount was allowed. *Held*, that this was evidence that all the payments were to go to pay for the flour, and not to discharge the preëxisting debt. And Lord *Ellenborough* said, "I think that in favor of a surety, such payments are to be considered as paid on the latter account. In some instances the payments were immediate, and in others before the time had expired, within which a discount was allowed; *ex plurimis disce omnes*. Where there is nothing to show the *animus solventis*, the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods previously supplied is irrefragable evidence to show that the sum was intended in payment of those goods, and the payment of sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it is made in relief of the surety." See Kirby *v.* The Duke of Marlborough, 2 M. & S. 18.

(*z*) Plomer *v.* Long, 1 Stark. 153. In Martin *v.* Brecknell, 2 M. & S. 39, it was held that the obligee of a bond, given by principal and surety, conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of 2*s.* and 7*d.* in the pound, may recover against the surety an instalment due, making a deduction of 2*s.* and 7*d.* on the amount of such instalment, and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only ratably in part payment of each instalment as it becomes due. See farther, Williams *v.* Rawlinson, 3 Bing. 71. The fact that a payment was made to a creditor having several demands against the same debtor, by a surety of such debtor on one of the debts, but with the debtor's own money, does not show that the debtor intended such payment to apply to the debt guaranteed. Mitchell *v.* Dall, 4 Gill. & Johns. 361. In Donally

In cases of payments which are not made by the debtor voluntarily, the creditor has no right of appropriation, but must apply the money towards the discharge of all the debts in proportion. (*a*)

A question has been made as to the manner of making up the account where partial payments have been made at different times, on bonds, notes, or other securities. Interest may be cast in three ways. It may be cast on the whole sum to the day of making up the account, and also upon each payment from the time when made to the same day, and the difference between these sums is the amount then due. Or interest may be cast on the whole sum to the day of the first payment, and added to the original debt, and the payment being deducted, on the remainder interest is cast to the next payment, and so on. The objection to this method is, that if the payment to be deducted is not equal to the interest which has been added to the original sum, then a part of this interest enters into the remainder, on which interest is cast, and thus the creditor receives compound interest. A third method is, to compute the interest on the principal sum from the time when interest became

v. Wilson, 5 Leigh. 329, it was held that if A. owes a debt to B., payable on demand, for which C. is A.'s surety, and A. assigns debts of others to B. in part payment, and after such assignment, but before the assigned debts are collected, A. contracts another debt to B., for which there is no security, B. cannot in such case, after the collection of the assigned debts, apply the same to the payment of A.'s last debt contracted after the assignment was made, and recover the whole amount of the first debt from the surety.—A debtor cannot appriate a payment in such manner as to affect the relative liability or rights of his different sureties without their consent. Postmaster-General *v.* Norvell, Gilpin. 106.

(*a*) Thus, where a creditor recovered one judgment on several notes, some of which were made by the judgment debtor alone, and others were signed also by a surety, and took out an execution which was satisfied in part by a levy, it was held that he could not appropriate this payment solely to the notes not signed by the surety, but that all the notes were paid proportionably. Blackstone Bank *v.* Hill, 10 Pick. 129. So where an insolvent debtor assigns his property for the benefit of such of his creditors as become parties to the assignment, and thereby release their claims, and a dividend is received by one of such creditors, it must be applied ratably to all his claims against the debtor, as well to those upon which other parties are liable, or which are otherwise secured, as to those which are not so secured. "This is not a case," say the court, "in which the debtor or creditor has the right to make the application of any payment, for the application is made by law according to the circumstances and justice of the case." Commercial Bank *v.* Cunningham, 24 Pick. 270. See also Merrimack County Bank *v.* Brown, 12 N. H. 320; Waller *v.* Lacy, 1 M. & Gr. 54. But see, *contra*, Portland Bank *v.* Brown, 22 Maine, 295.

payable to the first time when a payment, alone, or in conjunction with preceding payments with interest cast on them, shall equal or exceed the interest due on the principal. Deduct this sum, and cast interest on the balance as before. In this way payments are applied first to keep down the interest, and then to diminish the principal of the debt, and the creditor does not receive compound interest. This last method has been adopted in Massachusetts by decision, and generally prevails. (*b*)

One holding a note on which interest is payable annually or semi-annually may sue for each instalment of interest as it becomes payable, although the note is not yet due. (*c*) But after the principal becomes due the unpaid instalments of interest become merged in the principal, and must therefore be sued for with the principal, if at all. (*d*) And if he allows the time to run by without demanding interest, he cannot afterwards, in an action on the note, recover compound interest. (*e*)

SECTION II.

OF PERFORMANCE.

Having treated of payment as the specific defence to an action grounded on alleged non-payment, we will now speak of performance, generally, as the most direct contradiction and the most complete defence against actions for the breach of contract.

To make this defence effectual, the performance must have been by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him.

(*b*) Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 194; and see Connecticut *v.* Jackson, 1 Johns. Ch. 17; French *v.* Kennedy, 7 Barbour, 452; Williams *v.* Houghtaling, 3 Cowen, 87, *note;* Union Bank *v.* Kindrick, 10 Rob. [La.] 51; Hart *v.* Dorman, 2 Florida, 445; Jones *v.* Ward, 10 Yerg. 160; Spins *v.* Hamot; 8 M. & S. 17; United States *v.* McLemore, 4 How. 286; Story *v.* Livingston, 13 Pet. 359.

(*c*) Greenleaf *v.* Kellogg, 2 Mass. 568; Cooley *v.* Rose, 3 id. 221; Herries *v.* Jamieson, 5 T. R. 553. And see *ante*, p. 132, n. (*a*.)

(*d*) Howe *v.* Bradley, 19 Maine, 31.

(*e*) Hastings *v.* Wiswall, 8 Mass. 455; Ferry *v.* Ferry, 2 Cush. 92; Doe *v.* Warren, 7 Greenl. 48, and Bennett's note; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Van Bensscooter *v.* Lawson, 6 Johns. Ch. 313; Attwood *v.* Taylor, 1 M. & Gr. 279; Sparks *v.* Garrigues, 1 Binn. 152, 165.

Nor will a mere readiness to do discharge him from his liability, unless he makes that manifest by tender or an equivalent act. (*f*)

1. *Of Tender.*

If the tender be of money, it can be a defence only when made before the action is brought, (*g*) and when the demand

(*f*) Thus if a tenant by deed covenants to pay rent in the manner reserved in the lease, but no *place* of payment is mentioned, the tenant must seek out the lessor on the day the rent falls due, and tender him the money. It would not be sufficient that he was on the premises leased, at the day, ready with the money to pay the lessor, and that the latter did not come there to receive it. Haldane *v.* Johnson, 20 Eng. Law & Eq. 498. And see Poole *v.* Tumbridge, 2 M. & W. 223; Shep. Touch. 378; Rowe *v.* Young, 2 Bro. & Bing. 165. In Cranley *v.* Hillary, 2 M. & S. 120, the plaintiff had agreed with the defendant his debtor, to release him from the whole debt, if the debtor would secure him a part by giving him certain promissory notes. The plaintiff never applied for the notes, nor did the defendant ever tender them, but he was ready to give them if they had been applied for. The plaintiff afterwards sued the defendant on the original cause of action, and the defendant relied upon the agreement to compound. *Held*, that the defendant should have offered the plaintiff the notes, and that as he had not, the plaintiff was not barred from his action. See Soward *v.* Palmer, 2 Moore, 274; Reay *v.* White, 1 Cr. & Mees. 748, that a tender may be dispensed with under certain circumstances.

(*g*) Bac. Abr. Tender, (D); The Suffolk Bank *v.* The Worcester Bank, 5 Pick. 106. And in Hume *v.* Peploe, 8 East. 168, it was held that a plea of tender *after the day of payment* of a bill of exchange, and *before action brought*, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise. And Lord *Ellenborough* said, "In strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we cannot now suffer a new form of pleading to be introduced, different from that which has always prevailed in this case." And, per *Lawrence*, J.: "This is a plea in bar of the plaintiff's demand, which is for damages; and therefore it ought to show upon the record that he never had any such cause of action, but here the plea admits it." So in Poole *v.* Tumbridge, 2 M. & W. 223, where the defendant, the acceptor of a bill of exchange, pleaded that, *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill, with interest from the day when it became due, and that he had always, *from the time when the bill became due*, been ready to pay the plaintiff the amount, with interest aforesaid; the Court held the plea bad on special demurrer. And *Parke*, B., said:—"I have no doubt this plea is bad. The declaration states the contract of the defendant to be, to pay the amount of the bill on the day it became due, and that promise is admitted by the plea. It is clearly settled that an indorsee has a right of action against the acceptor by the act of indorsement, without giving him any notice; when a party accepts a negotiable bill, he binds himself to pay the amount, without notice, to whomsoever may happen to be the holder, and on the precise day when it becomes due; if he places himself in a situation of hardship from the difficulty of finding out the holder, it is his own fault. It is also clearly settled that the meaning of a plea of tender is, that the defendant was always ready to perform his engagement according to the nature of it, and did perform it so far as he was

is of money, and is definite in amount or capable of being made so. It seems to be settled that a tender may be made to a *quantum meruit*, although once held otherwise ; (*h*) but, generally, where the claim is for unliquidated damages, it has been held, in England, very strongly, that no tender is admissible. (*i*) In this country cases of accidental or involuntary trespass form an exception; in part by usage, or by an extension of the principle of the 21 Jas. 1, ch. 16, or express statutory provision. (*j*) This seems to be settled in some States, and would, we think, be held generally. A tender may be pleaded to an action on a covenant to pay money. (*k*)

A plea of tender admits the contract, and so much of the declaration as the plea is applied to. It does not bar the debt, as a payment would, but rather establishes the liability of the defendant; for, in general, he is liable to pay the sum which he tenders whenever he is required to do so. (*l*) But it

able, the other party refusing to receive the money. Hume *v.* Peploe is a decisive authority that the plea must state not only that the defendant was ready to pay on the day of payment, but that he tendered on that day. This plea does not so state, and is therefore bad." And see to the same, City Bank *v.* Cutter, 3 Pick. 414 ; Dewey *v.* Humphrey, 5 id. 187. The case of Johnson *v.* Clay, 7 Taunt. 486, if correctly reported is not law. Per *Parke*, B., in Poole *v.* Tumbridge, *supra*.

(*h*) This was settled in the case of Johnson *v.* Lancaster, Str. 576. The report of that case is as follows: — "It was settled on demurrer, that a tender is pleadable to a *quantum meruit*, and said to have been so held before in B. R., 10 W. 3, Giles *v.* Hart, 2 Salk. 622." In reference to this case of Giles *v.* Hart, the learned reporters, in a note to Dearle *v.* Barrett, 2 Ad. & El. 82, say : — "In Johnson *v.* Lancaster this case is cited from *Salkeld ;* and it is said to have been there decided that a tender is pleadable to a *quantum meruit ;* but that does not appear from the report in *Salkeld*, and the report in 1 Lord *Raymond*, 255, states a contrary doctrine to have been laid down by *Holt*, C. J., and is cited accordingly, in 20 *Vin. Ab.* tit. *Tender* (S). pl. 6. The point is not expressly mentioned in the reports of the same case in Carth. 413, 12 Mod. 152, Comb. 443, Holt. 556." And see Cox *v.* Brain, 3 Taunt. 95.

(*i*) Dearle *v.* Barrett, 2 Ad. & El. 82. This was an action by a landlord against a tenant, for not keeping the premises in repair, &c. The defendant moved for leave to pay £5 into court by way of compensation, under Stat. 3 & 4 Will. 4, c. 42, § 21, and also that it might be received in court under a plea of tender before action brought. *Patteson*, J., said : "Is there any instance of such a plea to an action for unliquidated damages ?" To which *White*, for the defendant, answered : — "A plea of tender is allowed to a count on a *quantum meruit*. It was so settled in Johnson *v.* Lancaster, 1 Str. 576. Although the contrary was once held in Giles *v.* Hartis, 2 Salk. 622." Lord *Denman* added, — "It does not follow because you may plead a tender to a count on a *quantum meruit*, that you may also plead it to any count for unliquidated damages." And see Green *v.* Shurtliff, 19 Verm. 592.

(*j*) New York Rev. St. vol. 2, p. 553, § 20, 22 ; Slack *v.* Brown, 13 Wend. 390 ; Mass. Rev. St. c. 105, § 12 ; Tracy *v.* Strong, 2 Conn. 659.

(*k*) Johnson *v.* Clay, 7 Taunt. 486 ; 1 Moore, 200.

(*l*) Cox *v.* Brain, 3 Taunt. 95; Huntington *v.* American Bank, 6 Pick.

puts a stop to accruing damages, or interest for delay in payment, and gives the defendant costs. (*m*) It need not be

340; Bennett *v.* Francis, 2 B. & P. 550; Seaton *v.* Benedict, 5 Bingh. 31; Jones *v.* Hoar, 5 Pick. 291; Bulwer *v.* Horne, 4 B. & Ad. 152; Stafford *v.* Clark, 2 Bing. 377.—The authorities and practice have not been entirely uniform as to the effect of a payment of money into court, either in actions of assumpsit or tort. In assumpsit the modern doctrine is that payment into court, when the counts are general, and there is no special count, is an admission that the amount paid in is due in respect of some contract, but not that the defendant is liable on any particular contract upon which the plaintiff may choose to rely. Kingham *v.* Robins, 5 Mees. & W. 94 (1839); Stapleton *v.* Nowell, 6 M. & W. 9 (1840); Archer *v.* English, 1 Man. & Gr. 873 (1840); Charles *v.* Branker, 12 Mees. & Wels. 743 (1844); Edan *v.* Dudfield, 5 Jurist, 317 (1841.) On the other hand, if the declaration is on a special contract, and it seems on the same principle, if there are general counts and also a special count, the payment admits the cause of action as set forth in such special count, but does not admit the amount of damages therein stated. Stoveld *v.* Brewin, 2 Barn. & Ald. 116 (1818); Guillod *v.* Nock, 1 Esp. 347 (1795); Wright *v.* Goddard, 8 Adol. & El. 144 (1838); Yate *v.* Willan, 2 East. 134 (1801); Bulwer *v.* Horne, 4 Barn. & Ad. 132 (1832); Bennett *v.* Francis, 2 Bos. & Pull. 550 (1801.) In Jones *v.* Hoar, 5 Pick. 285 (1827,) there were three counts, one upon a promissory note, one for goods sold and delivered, and a third for money had and received. The defendant brought in money generally, "on account of, and in satisfaction of the plaintiff's damages in the suit." The court thought this an admission of *all* the contracts set forth in the declaration, but under the circumstances the defendant had leave to amend and specify that the money was intended to be paid in upon the promissory note. So in Huntington *v.* American Bank, 6 Pick. 340 (1828), there were two counts, first, on an account annexed to the writ, for the plaintiff's services, claiming a specific sum; and second, a count claiming a reasonable compensation for his services, and alleging their value at $1,500. The defendant paid $300 into court. The principal question was, whether the defendant by paying the money into court generally, without designating the count on which it was paid in, admitted the contract of hiring, as set out in the second count, thus leaving no question for the jury, except the value of the plaintiff's services. The court *held* that it did. In Spalding *v.* Vandercook, 2 Wend. 431 (1829,) the declaration contained a count on a promissory note for $131, and also the common money counts. The defendant paid in $89 and sought to reduce the amount of the plaintiff's demand to that sum, by showing that the consideration of the note failed. The court admitted evidence to that point, notwithstanding the plea. See Donnell *v.* Columbian Insurance Company, 2 Sumner, 366 (1836.) In Elgar *v.* Watson, 1 Carr. & Marsh. 494 (1842,) the action was assumpsit for use and occupation, and for money lent. *Coleridge*, J., *held* that a general payment by the defendant, acknowledged the plaintiff's right to recover *something* on every item in his bill of particulars, and it was for the jury to assess the amount.—In actions of *tort* the same general principles seem to be applied. If the declaration is *special*, payment into court operates as an admission of the cause of action, as set out in the declaration. Thus in actions against railways for injuries received by the negligence of the company, or in an action against a town for a defect in the highway, payment into court admits the defendant's liability as set out, and leaves the question of damages for the jury. Bacon *v.* Charlton, 7 Cush. R. 581; Perren *v.* The Monmouthshire Railway Co., 20 Eng. Law & Eq. 258; and see Lloyd *v.* Walkey, 9 C. & P. 771. On the other hand, if a declaration in tort is *general*, as in trover for a number of articles, payment into court would admit a liability on *some* cause of action, but not any particular article mentioned in the declaration. Schreger *v.* Carden, 10 Eng. Law & Eq. 513; Cook *v.* Martle, 8 C. & P. 568; Story *v.* Finnis, 3 Eng. Law & Eq. 548.

(*m*) Dixon *v.* Clark, 5 Com. B. R. 365; Waistell *v.* Atkinson, 3 Bing. 290; Law

made by the defendant personally; if made by a third person, at his request, it is sufficient; (*n*) and if made by a stranger without his knowledge or request, it seems that a subsequent assent of the debtor would operate as a ratification of the agency and make the tender good. (*o*) Any person may make a valid tender for an idiot; and the reason of this rule has been held applicable to a tender for an infant by a relative not his guardian. (*p*) And if an agent furnished with money to make a tender, at his own risk tenders more, it is good. (*q*) So a tender need not be made to a creditor personally; but it must be made to an agent actually authorized to receive the money. (*r*) If the money be due to several jointly, it may be tendered to either, but must be pleaded as made to all. (*s*) It perhaps is good if made to one appointed executor, if he afterwards prove the will. (*t*)

The whole sum due must be tendered, (*u*) as the creditor is not bound to receive a part of his debt. But this does not mean the whole that the debtor owes to the creditor; for he may owe him many distinct debts; and if they are perfectly separable, as so many notes, or sums of money

v. Jackson, 9 Cow. 641; Coit *v.* Houston, 3 Johns. Cas. 243; Carley *v.* Vance, 17 Mass. 389; Raymond *v.* Bearnard, 12 Johns. 274; Cornell *v.* Green, 10 S. & R. 14. A tender may be sufficient to stop the running of interest although not a *technical* tender so as to give costs. Goff *v.* Rehoboth, 2 Cush. 477; Suffolk Bank *v.* Worcester Bank, 5 Pick. 106.

(*n*) Cropp *v.* Hambleton, Cro. El. 48; 1 Rol. Abr. 421, (K.) pl. 2. A tender may be made by an inhabitant of a school district, on behalf of such district, without any express authority, and this, if ratified by the district is a good tender. Kincaid *v.* Brunswick, 2 Fairf. 188.

(*o*) Per *Best*, C. J., in Harding *v.* Davis, 2 C. & P. 78; and see 11 Maine, 188, 2 M. & S. 86.

(*p*) Co. Litt. 206. Brown *v.* Dysinger, 1 Rawle, 408.

(*q*) Read *v.* Goldring, 2 M. & S. 86.

(*r*) Kirton *v.* Braithwaite, 1 M. & W. 313; Goodlead *v.* Blewith, 1 Campb. 477. Tender to a merchant's clerk, at the store, for goods previously bought there, is good, although the claim had then been lodged with an attorney for collection. Hoyt *v.* Byrnes, 2 Fairf. 475. And this although the clerk had been forbidden to receive the money, if tendered. Moffat *v.* Parsons, 5 Taunt. 307. Tender to the attorney of a creditor who has the claim left for collection, is good. Watson *v.* Hetherington, 1 C. & K. 36; Crozer *v.* Pilling, 4 B. & C. 28; S. C. 6 D. & R. 132. And tender to such attorney's clerk, at his office, the principal being absent, may be good. Kirton *v.* Braithwaite, *supra;* and see Wilmot *v.* Smith, 3 C. & P. 453; Barrett *v.* Deere, M. & Malk. 200; See Bingham *v.* Allport, 1 Nev. & Man. 398. The debtor is not obliged to tender for such attorney's *letter*. Kirton *v.* Braithwaite, *supra.*

(*s*) Douglas *v.* Patrick, 3 T. R. 683. So a tender of a deed to one of two joint purchasers is sufficient. Dawson *v.* Ewing, 16 S. & R. 371.

(*t*) 1 Eq. Cas. Abr. 319. But see Todd *v.* Parker, Coxe, 45.

(*u*) Dixon *v.* Clark, 5 C. B. 365. In this case a declaration in debt on simple contract contained two counts, in each

otherwise distinct, the debtor has a right to elect such as he is willing to acknowledge and pay, and make a tender of them. And if the tender be for more than the whole debt,

of which £26 were demanded. The defendants pleaded as to the causes of action, as to £5, parcel, &c., a *tender*. The plaintiff replied that before and at the time of the tender, and of the request and refusal after mentioned, and until, and at the commencement of the action, a larger sum than £5, to wit, £13 15*s*., part of the money in the declaration demanded, was due from the defendants to the plaintiff *as one entire sum, and on one entire contract and liability*, and inclusive of, and not separate or divisible from the said sum of £5, and the same being a contract and liability by which the defendants were liable to pay to the plaintiff the whole of the said larger sum, in one entire sum upon request; and that, after the last mentioned and larger sum had become so due, and while the same remained unpaid, the plaintiff requested of the defendants payment of the last mentioned and larger sum, of which the said £5 in the plea mentioned was then such indivisible parcel as aforesaid, yet that the defendants refused to pay the said larger sum; wherefore the plaintiff refused the said £5. *Held*, on special demurrer, that the replication was a good answer to the plea, and that, if there was any set-off or other just cause for not paying the larger sum, it should have come by way of rejoinder. So in Boyden *v.* Moore, 5 Mass. 365, where the defendant had brought into court what she supposed justly due on the action, and the costs up to the time, but upon the trial it appeared that she had brought in too little by forty-one cents, and the judge directed the jury that they might still find a verdict for the defendant, if the balance appeared to them a mere trifle, and they found accordingly, a new trial was granted for the misdirection of the judge. And *Parsons*, C. J., said: — "It is a well known rule that the defendant must take care at his peril, to tender enough, and if he does not, and if the plaintiff replies that there is more due than is tendered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the sum due on the promise; and if it be not covered by the money tendered, he will have judgment for the balance. If the present direction of the judge had been in the trial of such an issue arising on a plea of tender, we cannot think the direction to be right. The defendant cannot lawfully withhold from the plaintiff any money due to him, however small the sum, and if the defendant intended to tender as much money as the plaintiff could claim, but made a mistake in her calculation, she must suffer for her own mistake, and not the plaintiff, although the injury to him may be very small, and such as most men would disregard. From the calculation made by the judge in the hurry of the trial the deficiency was about fourteen cents, but on a more correct calculation it amounts to about forty-one cents. And if at the time the money was brought in, no action had been pending, and the plaintiff had then received and indorsed the payment, he might afterwards have commenced and maintained an action to recover the balance then due. That the law will not regard trifles is, when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest there may and probably must arise fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. In making payments it is sometimes not possible, from the value and divisions of the current coin, to make the exact sum; — if the payment be made as nearly as it can conveniently be made, the fractional part of a small coin may be neglected; it is a trifle. But the present case is not one of these trifles. A man may sue and recover on a note given for forty cents; also on a larger note where forty cents remain unpaid. It is therefore our opinion that the jury ought to have been directed to calculate the interest on the second note, and deducting the payments, if a balance remained unpaid, to find that balance for the plaintiff. If any sum large enough to be discharged in the current coin of the country is a trifle, which although due, the jury are not obliged by law to award to the plaintiff, the creditor; it will be difficult to draw a line and say how

it is valid; (*v*) unless it be accompanied with a demand of the balance, and the creditor objects for that reason. If the obligation be in the alternative, one thing or another as the creditor may choose, the tender should be of both that he may make his choice. (*w*)

A tender must be made at common law, on the very day the money is due, if that day be made certain by the contract. (*x*) But the statutes and usages of our States (*y*) generally permit the tender to be made after that day, but before the action is brought; and in some it may be made

large a sum must be, not to be a trifle. The law gives us no rule." But a tender of the sum *justly due* by the condition of a *bond*, is good, although less than the penalty. Tracy *v.* Strong, 2 Conn. 659.

(*v*) Astley *v.* Reynolds, 2 Str. 916; Wade's case, 5 Rep. 115; Dean *v.* James, 4 B. & Ad. 546; Douglas *v.* Patrick, 3 T. R. 683; Black *v.* Smith, Peake, 88; Cadman *v.* Lubbock, 5 D. & R. 289; Bevans *v.* Rees, 5 M. & W. 306. In this last case the defendant, who owed the plaintiff £108 for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount, sent a person to the attorney, who told him he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 150 sovereigns, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account, due from the plaintiff to the defendant were fixed at a certain amount: — *Held*, that this was a good tender of the £108, the fixing of the shop account being a collateral matter, which the attorney had no right to require. And Lord *Abinger* said: — "I am not disposed to lay down general propositions, unless where it is necessary to the decision of the case; but I am prepared to say, that if the creditor knows the amount due to him, and is offered a larger sum, and, without any objection on the ground of want of change, makes quite a collateral objection, that will be a good tender." But the tender of a £5 bank note in payment of a debt of £3 10*s.*, and requesting the creditor to make the change, and return the balance, has been held a bad tender. Betterbee *v.* Davis, 3 Campb. 70; and see Robinson *v.* Cook, 6 Taunt. 336; Blow *v.* Russell, 1 C. & P. 365. If however the creditor does not object to the request for change, but claims that more is due than the *whole amount* tendered, and therefore refuses to receive the tender, the tender is good. Black *v.* Smith, Peake, 88; Cadman *v.* Lubbock, 5 D. & R. 289; Saunders *v.* Graham, Gow, 121. And so if he refuses the tender merely on the ground that the debtor will not pay with the surplus another and distinct debt, or unless the debtor will fix his own counter claim against the creditor at a certain sum. Bevans *v.* Rees, 5 M. & W. 306. If a creditor has separate claims against divers persons for different amounts, a tender of one gross sum for the debts of all, will not support a plea of tender, stating that a certain portion of the whole sum was tendered for the debt of one. Strong *v.* Harvey, 3 Bing. 304. But a tender of one gross sum upon several demands from same debtor, without designating the amount tendered upon each, is good. Thetford *v.* Hubbard, 22 Vermont, 440.

(*w*) Fordley's Case, 1 Leon. 68.

(*x*) City Bank *v.* Cutter, 3 Pick. 414; Dewey *v.* Humphrey, 5 Pick. 187; Maynard *v.* Hunt, id. 240; Gould *v.* Banks, 8 Wend. 563; Day *v.* Lafferty, 4 Pike, 450; and see *ante*, p. 148. n. (*g.*) *Perhaps* on a contract for the payment of money, simply, when interest would be the only damages to be recovered, a tender of the principal *and interest*, to the day of tender, might be sufficient, if made before action brought. But see *ante*, p. 148, n. (*g.*)

(*y*) This is the rule in Connecticut from usage. Tracey *v.* Strong, 2 Conn. 659.

after the action is brought. It can not generally be made before the debt is due, as the creditor is not then obliged to accept it, even if it does not draw interest. (*z*)

To make a tender of money valid, the money must be actually produced and proffered, (*a*) unless the creditor expressly or impliedly waives this production. (*b*) And it seems

(*z*) There can be no doubt that a tender of a debt due at a certain day, before such day, without tendering also interest up to the day of maturity, is bad, where the debt is drawing interest. Tillou *v.* Britton, 4 Halstead, 120; Saunders *v.* Frost, 5 Pick. 267, per *Parker*, C. J. It is not so clear that if a debt is not drawing interest, tender of the debt before the day it is due and payable, is not good; and one case has expressly held it valid. M'Hard *v.* Whetcroft, 3 Harris & McHenry, 85.

(*a*) Sucklinge *v.* Coney, Noy, 74. This case is stated in the book as follows: — "Upon a special verdict, upon payment for a redemption of a mortgage, the mortgagor comes at the day and place of payment, and said to the said mortgagee, 'Here, I am ready to pay you the £200,' which was of due money, and yet held it all the time upon his arm in bags; and adjudged no tender, for it might be counters or base coin for any thing that appeared." And Mr. Justice *Anderson*, said,—"It is no good tender to say I am ready, &c." So in Comyns' Digest, Pleader (2 W.) 28, it is said "If issue be upon the tender, there must be an actual offer. The tender alleged must be legal, and therefore it is not sufficient to say *paratus fuit solvere*, without saying, *et obtulit*." See also Thomas *v.* Evans, 10 East, 101; Dickinson *v.* Shee, 4 Esp. 68; Kraus *v.* Arnold, 7 Moore, 59; Leatherdale *v.* Sweepstone, 3 C. & P. 342; Finch *v.* Brook, 1 Scott, 70; Glascott *v.* Day, 5 Esp. 48; Brown *v.* Gilmore, 8 Greenl. 107. It is at all events essential, that the debtor have the money ready to deliver. It is not sufficient that a third person on the spot has the money which he would lend to the debtor, unless he actually consents to lend it. Sargent *v.* Graham, 5 N. H. 440; Fuller *v.* Little, 7 N. H. 535. The rule is thus laid down in Bakeman *v.* Pooler, 15 Wend. 637; — to prove a plea of *tender*, it must appear that there was a *production* and *manual offer* of the money unless the same be dispensed with by some positive act or declaration on the part of the creditor; it is not enough that the party has the money in his *pocket*, and says to the creditor that he has it ready for him, and asks him to take it, without showing the money.

(*b*) The decisions are nice, and perhaps not altogether harmonious upon the point of what consitutes a waiver of the production and offer of the money, so as to render a tender valid. In Read *v.* Goldring, 2 M. & S. 86, the agent of the debtor pulled out his pocket book, and told the plaintiff if he would go to a neighboring public house, he would pay the debt. The agent had the necessary amount in his pocket book, but no money was produced. The creditor refused to take the amount. Yet this was held a good tender. On the other hand, in Finch *v.* Brook, 1 Scott, 70, the defendant's attorney called at the plaintiff's shop to pay him the debt, having the money in his pocket for that purpose, and mentioned the precise sum, and at the same time put his hand into his pocket for the purpose of taking out the money, but did not actually produce it, the plaintiff saying he could not take it:—And, *semble*, that this was a sufficient tender, the plaintiff having dispensed with the actual production of the money; but *quære* whether such dispensation ought not to have been specially pleaded. And in Breed *v.* Hurd, 6 Pick. 356, a witness told the plaintiff that the defendant had left money with him to pay the plaintiff's bill, and that if the plaintiff would make it right, by deducting a certain sum, he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; and he swore that he believed, but did not know, that there was money enough in his desk, but if there was not, he would have obtained it in five minutes, if the plaintiff would have made the deduction, but the plaintiff replied that he would deduct nothing: — *Held*, that this was not a tender. And per *Curiam*, "To our

that the creditor may not only waive the actual production of the money, but the actual possession of it in hand by the debtor. But it has been held that if a debtor has offered to pay and is about producing the money and is prevented by the creditor's leaving him, this is not a tender. (*c*) The creditor is not bound to count out the money, if he has it, and offers it. (*d*)

The tender must be unconditional; so, at least, it is sometimes said; but the reasonable, and we think the true rule is, that no condition must be annexed to the tender, (*e*) which the creditor can have any good reason whatever for objecting to; as, for instance, that he should give a receipt in full of all demands. (*f*) It may not perhaps be quite settled that the

surprise there are cases very nearly like this, where the offer was held to be a valid tender, as in Harding *v.* Davies, 2 Carr. & Payne, 77, where a woman stated 'that she had the money up stairs.' Here the witness said he could get the money in five minutes. We all think this was not a tender. The party must have the money about him, wherewith to make the tender, though it is not necessary to count it. We think there was not a tender here, even on the broad cases in England."

(*c*) Leatherdale *v.* Sweepstone, 3 C. & P. 342. In this case in order to prove the tender a witness was called, who stated that he heard the defendant offer to pay the plaintiff the amount of his demand, deducting 14*s.* 0¾*d.*, which balance was the sum stated in the plea; that the defendant then put his hand into his pocket, but before he could take out the money the plaintiff left the room and the money was therefore not produced till the plaintiff had gone. Lord *Tenterden* held this no tender. But this was only a *Nisi Prius* case and may perhaps be questionable. For if a tender be designedly avoided by the creditor, he ought not to object that no tender was made. Gilmore *v.* Holt, 4 Pick. 258; Southworth *v.* Smith, 7 Cush. 391.

(*d*) Wheeler *v.* Knaggs, 8 Ohio, 169, 172; Dehaly *v.* Hatch, Walker, [Miss.] 369; Breed *v.* Hurd, 6 Pick. 356.

(*e*) In Bevans *v.* Rees, cited, *supra*, n. (*v*), *Maule*, B., said, "No doubt a tender must be of a specific sum, on a specific account; and if it be upon a condition which the creditor has a right to object to, it is not a good tender. But if the only condition be one which he no right to object to, and he has still power to take the money due—as if the condition were, 'I will pay the money if you will take it up,' or the like — that does not invalidate the tender. Here the defendant offers the plaintiff the option of taking any amount which he says is due, and only offers it in satisfaction of that amount; there is no condition therefore which the plaintiff has a right to object to."

(*f*) It has been often adjudged that if the debtor demand a receipt *in full*, this vitiates his tender. Glasscott *v.* Day, 5 Esp. 48, seems to be a leading case on this point. The sum claimed in the action was £20. The defendant pleaded non-assumpsit, except as to £18, and as to that a tender. The witness for the defendant, who proved the tender, stated, that he went to the plaintiff with the money, which he offered to pay on the plaintiff giving him a receipt in full. The plaintiff refused to receive it. And Lord *Ellenborough* held this not to be a good tender. Thayer *v.* Brackett, 12 Mass. 450, is also in point. The real debt was $190.25. Part of this debt had been paid by the note of a third person, which was indorsed by the debtor to the plaintiff. If this note had been paid at maturity, the defendant would still have been indebted to the plaintiff in the sum of $40, which he tendered, but required a receipt in

debtor may not demand a receipt for the sum which he pays, and if this be refused, retain the money, and yet (if always ready to pay it on those terms,) have the benefit of his tender. But the authorities seem to go in this direction. If however a tender be refused on some objection quite distinct from the manner in which it was made, as for the insufficiency of the sum or any similar ground; objections arising from the form of the tender are considered as waived, and cannot afterwards be insisted upon. (*g*)

full of all *demands*. The creditor refused to give this, as the note was still unpaid, but offered to give a receipt in full of all *accounts;* whereupon the tender was withdrawn. *Parker*, C. J., said, — "The defendant lost the benefit of his tender by insisting on a receipt in full of all demands, which the plaintiff was not obliged to give him. The defendant should have relied on his tender and upon proof at the trial that no more was due. But he withdrew the tender, because the plaintiff would not comply with the terms which accompanied it. This cannot be deemed a lawful tender, and according to the agreement of the parties, judgment must be entered for the plaintiff for the balance of his account and for his costs." And see Loring *v.* Cooke, 3 Pick. 48. Wood *v.* Hitchcock, 20 Wend. 47, is a strong case to this point. It is there held that a tender of money in payment of a debt to be available must be without qualification, i. e., there must not be any thing raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held in this case that the tender of a sum of money *in full discharge* of all demands of the creditor was not good. And *Cowen*, J., said:— "Very likely the defendant when he made the tender owed the plaintiff in the whole more than eighty-five dollars, but has succeeded, by raising technical difficulties, in reducing the report to that sum. Independent of that, however, the tender was defective. It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books. The tender was also bad, because the defendant would not allow that he was even liable to the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. He must also avoid all counter claim, as of a set-off against part of the debt due. That this defendant intended to impose the terms or raise the inference that the acceptance of the money should be in full, and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter-claim. It is not of the nature of a tender to make conditions, terms, or qualifications, but simply to pay the sum tendered, as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt, or an intimation that it is expected, as by asking 'Have you got a receipt,' will vitiate. The demand of a receipt in full would of course be inadmissible." The reason of this rule is obvious where the debtor does not in fact tender all that is due; for if a debtor tenders a certain sum as all that is due, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more; but if the same sum was tendered *unconditionally*, no such effect could follow. Sutton *v.* Hawkins, 8 C. & P. 259. The reason why a tender has so often been held invalid, when a receipt in full was demanded, seems not to have been merely because a receipt was asked for, but rather because a part was offered in full payment. See Cheminant *v.* Thornton, 2 C. & P. 50; Peacock *v.* Dickerson, 2 C. & P. 51, n. It is believed that no case has gone so far as to hold that a tender would be bad because a receipt for the *sum tendered* was requested.

(*g*) Cole *v.* Blake, Peake, 179; Rich-

The tender should be in money made lawful by the State in which it is offered. (*h*) But if it be offered in bank bills which are current and good, and there is no objection to them at the time on the ground that they are not money, it will be considered so far an objection of form, that it cannot afterwards be advanced. (*i*)

By a tender is meant, not merely that the debtor was *once* ready and willing to pay, but that he has always been so and still is. The effect of it will therefore be destroyed if the creditor can show a demand by him of the proper fulfilment of the contract, at the proper time, and a refusal by the debtor. (*j*) But if the demand is for more than the sum tendered, it will not avoid the tender. (*k*) A demand and refusal may in some cases have the effect of annulling a tender, even if they take place before the tender was made; although, as has been said, generally, in this country a tender is valid and effectual if made at any time after a debt is due.

2. *Of the tender of chattels.*

The thing to be tendered may not be money, but some specific article; and the law in relation to the delivery of these under a contract has been much discussed, and is not perhaps yet quite settled. We have alluded to some of the questions which this topic presents, when speaking of sales of chattels. Others remain to be considered.

It may be considered as settled, that acts which would constitute a sufficient tender of money, will not always have

ardson *v.* Jackson, 8 M. & W. 298; Bull *v.* Parker, 2 Dowl. N. S. 345.

(*h*) Wade's case, 5 Rep. 114; Hallowell *v.* Howard, 13 Mass. 235; Moody *v.* Mahurin, 4 New H. R. 296.

(*i*) This may be fairly inferred from the case of Warren *v.* Mains, 7 Johns. 476; and see Ball *v.* Stanley, 5 Yerger, 199; Wheeler *v.* Knaggs, 8 Ohio, 172; Brown *v.* Dysinger, 1 Rawle, 408; Snow *v.* Perry, 9 Pick. 542; Towson *v.* Havre-de-Grace Bank, 6 H. & John. 53.

(*j*) Dixon *v.* Clark, 5 C. B. 365; and see Cotton *v.* Godwin, 7 M. & W. 147.

(*k*) Thetford *v.* Hubbard, 22 Vermont, 440. Certainly not, if the demand is for more than the real debt, although the excess was for another debt truly due. Dixon *v.* Clark, 5 C. B. 378. And see Brandon *v.* Newington, 3 Q. B. Rep. 915; Hesketh *v.* Fawcett, 11 M. & W. 356; apparently overruling Tyler *v.* Bland, 9 M. & W. 338.

this effect in relation to chattels. Thus, if one who is bound to pay money to another at a certain time and place, is there with the money in his pocket for the purpose of paying it, and is prevented from paying it only by the absence of the payee, this has the full effect of a tender. (*l*) But if he is bound to deliver chattels at a particular *time* and *place*, it may not be enough if he has them there. They may be mingled with others of the like kind which he is not to deliver. Or they may need some act of separation, or identification, or completion, before they could become the property of the other party. (*m*) As in sales, the property in chattels does not pass

(*l*) Gilmore *v.* Holt, 4 Pick. 258; Southworth *v.* Smith, 7 Cush. 391.

(*m*) Veazy *v.* Harmony, 7 Greenl. (Bennett's Ed.) 91; Wyman *v.* Winslow, 2 Fairf. 398; Leballister *v.* Nash, 24 Maine, 316; Bates *v.* Churchill, 32 Maine, 31; Bates *v.* Bates, Walker, 401; Newton *v.* Galbraith, 5 Johns. 119. In this last case a note was payable in produce at the maker's house. The defendant pleaded payment, and proved that he had hay in his barn, and was there ready to pay, and the plaintiff did not come for it. He did not prove how much he had, nor its value. *Held* no payment, nor tender. So in Barney *v.* Bliss, 1 D. Chipman, 399, the Supreme Court of Vermont *held* that a plea that the debtor had the property ready at the time and place, and there remained through the day, ready to deliver it, but that the creditor did not attend to receive it, and that the property is still ready for the creditor, if he will receive it, was not sufficient to discharge the contract, and vest the property in the payee. The debtor ought to have gone farther, and set apart the chattels [boards] so that the payee could have identified and taken them. See also Barns *v.* Graham, 4 Cowen, 452; Smith *v.* Loomis, 7 Conn. 110. This last case denies to be sound law the case of Robbins *v.* Luce, 4 Mass. 474, in which the defendant had contracted to deliver the plaintiff 27 ash barrels, at the defendant's dwelling-house, on the 20th Sept., 1804. Being sued on the contract, the defendant pleaded in bar that on the day he had the said 27 barrels at his dwelling house *ready* to be delivered, and had always had the same ready for delivery. The plea did not aver that the plaintiff was not there to receive them, but the plea was still held good on special demurrer. See also Robinson *v.* Batchelder, 4 N. H. 40; and Brown *v.* Berry, 14 N. H. 459, which tends to support Robbins *v.* Luce. In McConnel *v.* Hall, Brayton, 223, the Supreme Court of Vermont held that a promise to pay the plaintiff a wagon to be delivered at the defendant's store, was not complied with by the fact that the defendant had the wagon at the time and place ready to be delivered, according to the contract. But the question here arose under the *general issue*, and the Court held that the fact of readiness and willingness did not support the fact of *payment* or *discharge* of the contract, but the case does not decide that the defendant, had he pleaded *in bar*, that he was ready at the time and place to deliver the wagon, and that the plaintiff was not there to receive it, must have also proved that he so designated and set apart the wagon, as to vest the property in the plaintiff. The same distinction between the defence of *payment*, and a defence founded upon special matter pleaded *in bar*, was recognized in the subsequent case of Downer *v.* Sinclair, 15 Vermont, 495. There the defendant had agreed to deliver at his shop, and the plaintiff had agreed to receive certain "winnowing mills" in discharge of a debt. A part had been delivered and received at said shop, and their value indorsed on the claim. On the day the remainder were due the plaintiff called at the defendant's shop for them, but did not find the defendant at home, and went away without making any demand. On *the same day* the defendant returned, and being

while any such act remains to be done, so, if there be an obligation to deliver these articles, it may be said as a general rule, that the obligation is not discharged so long as any thing is left undone which would prevent the property from passing under a sale. That is, it is no tender, unless so much is done that the other party has nothing to do but signify his acceptance in order to make the property in the chattels vest at once in him. An exception would doubtless be made to this rule, in reference to chattels which could be ascertained and specified by weight, measure, or number. If one bound to deliver twenty bushels of wheat at a certain time and place, came there with fifty bushels in his wagon, all of the same quality, and in one mass, with the purpose of measuring out twenty bushels; and was prevented from doing so only by the absence of the promisee, this must be a sufficient tender. It is not necessary that the chattels should be so discriminated that they might be described and identified with the accuracy necessary for a declaration in trover, because, except in some instances to be spoken of presently, the promisee does not acquire property in the chattels by a tender of them which he does not accept. He may still sue on the contract; and to this action the promisor may plead a tender, and "that he always has been and now is ready" to deliver the same; and then the promisee may take the goods and they become his property, and the contract is discharged. But the promisor need not plead the tender unless he choose to do so. He may waive it, and then the promisee recovers

informed what had taken place, set apart for the plaintiff the number of mills requisite to complete the contract. These mills had ever since remained so set apart; the plaintiff never called again, but brought suit upon his original claim. The court held that these facts would not support a plea of *payment*, since they were not given and *received* by the creditor, but that they would be a special defence to the action, and gave judgment for the defendant. See Mattison *v.* Wescott, 13 Vermont, 258; Gilman *v.* Moore, 14 Vermont, 457. But if a plea of readiness and willingness to perform, amounts to a defence, the plea should be full and positive; it should leave nothing open to inference. Thus in Savary *v.* Goe, 3 Wash. C. C. 140, the contract was to deliver to the plaintiff a quantity of whiskey in the month of May, 1809. The defendant being sued on the contract, pleaded that he was ready and willing at the time and place agreed upon to deliver the whiskey, according to the terms of the contract; but that the plaintiff was not then and there ready to accept the same; but the plea did not state that the defendant *was at the place*, in person or by agent, ready and prepared to deliver the whiskey, and for this omission the plea was held insufficient.

only damages for the breach of the contract, and acquires no property in the chattels.

When a tender is pleaded with a profert, the defendant should have the article with him in court. But this would be sometimes inconvenient, in the case of very bulky articles, and sometimes impossible. A reasonable construction is therefore given to this requirement; and it is sufficient if the defendant be in actual possession of the article, and ready to make immediate delivery to the plaintiff, in a manner reasonably convenient to him. (*n*) In such case, however, it must be averred in the plea that the thing cannot, by reason of its weight, conveniently be brought into court. (*o*)

The tender must be equally unconditional as if of money. It may be made to an agent, or by an agent; but if the agent of the deliverer has orders to deliver the chattels to the receiver only if he will cancel and deliver up the contract, this is not a tender, although such agent had the chattels at the proper time and place. (*p*)

It is a good defence *pro tanto* in such a contract, that the plaintiff accepted a part of the articles before the day specified in the contract; (*q*) or that there was an agreement between the parties, which may be by parol, that the chattels should be delivered at another time and place, and that the plaintiff was there, wholly ready to deliver them. (*r*) Or that the defendant knew that the articles were delivered at another time and place, and did not dissent or object. (*s*)

Generally, if no time or place be specified, the articles are to be delivered where they are at the time of the contract, (*t*)

(*n*) Bro Abr. tit. Tout temps prist, pl. 3; 2 Rol. Abr. 524.

(*o*) Id.

(*p*) Robinson *v.* Batchelder, 4 N. H. 40.

(*q*) Id.

(*r*) Id.

(*s*) Flagg *v.* Dryden, 7 Pick. 53.

(*t*) Bronson *v.* Gleason, 7 Barbour, 472; Barr *v.* Myers, 3 Watts & Serg. 295, a sale of 2000 mulberry trees. The reason is that the party to receive is to be the actor, by going to demand the articles; and until then, the other party is not in default by omitting to tender them. See also Thaxton *v.* Edwards, 1 Stewart, 524; McMurry *v.* The State, 6 Alabama, 326; Minor *v.* Michie, Walker, 24; Chambers *v.* Winn, Hardin, 80, n.; Dandridge *v.* Harris, 1 Wash. 328. A note payable in specific articles, without mentioning time or place, is payable only on demand, and should be demanded at the place where the property is. Lobdell *v.* Hopkins, 5 Cow. 518. Vance *v.* Bloomer, 20 Wend. 196. In Rice *v.* Churchill, 2 Denio, 145, a note was given by the owner of a sawmill, payable in lumber, when called for. It was

unless collateral circumstances designate a different place. (*u*) If the time be fixed, (*v*) but not the place, then it will be presumed that the deliverer was to bring the articles to the receiver at that time, and for that purpose he must go with the chattels to the residence of the receiver, (*w*) unless something in their very nature or use, or some other circumstance of equivalent force, distinctly implies that they are to be left at some other place. (*x*) And it may happen, from the cumbrousness of the chattels, or other circumstances, that it is obviously reasonable and just for the deliverer to ascertain from the receiver, long enough beforehand, where they shall be delivered; and then he will be held to this as a legal obligation. (*y*) So too, in such a case, the receiver would

held to be payable at the maker's mill, and that a special demand there was necessary to fix the maker, unless he had waived the necessity thereof.

(*u*) Thus in Bronson *v.* Gleason, 7 Barbour, 472, while the general rule was admitted, that the store of the merchant, the shop of the mechanic, or manufacturer, and the farm or granary of the farmer, is the place of delivery when the contract is silent on the subject; this rule was held inapplicable when the collateral circumstances indicated a different place. It was there held that where goods are a subject of general commerce, and are purchased in large quantities for reshipment, and the purchaser resides at the place of reshipment, and has there a storehouse and dock for that purpose, a contract to deliver such purchaser "400 barrels of salt in *good order*, before the first of November," meant, a delivery at the purchaser's place of residence.

(*v*) If the time fall on Sunday, tender on Monday is good. Barrett *v.* Allen, 10 Ohio, 426; Avery *v.* Stewart, 2 Conn. 69. Salter *v.* Burt, 20 Wend. 205.—Questions often arise as to the *time of day* at which a tender may, or must be made. It seems that the debtor must have the property at the place agreed upon, at the last convenient hour of that day. See Tiernan *v.* Napier, 5 Yerger, 410; Aldrich *v.* Albee, 1 Greenl. R. (Bennett's Ed.) 120; Savary *v.* Goe, 3 Wash. C. C. R. 140. Unless by the acts of the parties this is waived. In Sweet *v.* Harding, 19 Vermont, 587, a note was payable in grain, "*in January.*" Tender was made early in the evening of the last day of that month, *but the payee was absent.* The tender or separation of the grain was at the debtor's own dwelling house. (where by the contract it was to be delivered) and the payee did not know of it. The tender was held to be too late, and no defence to the contract. But rent may be tendered to the lessor personally on the evening it falls due. Id. And see Startup *v.* Macdonald, 2 Scott, N. R. 485.

(*w*) Barr *v.* Myers, 3 Watts & Serg. 295; Roberts *v.* Beatty, 2 Penn. 63. In such cases the creditor has the right to appoint the place of delivery. Aldrich *v.* Albee, 1 Greenl. R. (Bennett's Ed.) 120.

(*x*) If the *time* be fixed, and by the contract, the payee has his election of the *place*, he must notify the payor of his election in a reasonable time *before* the day of payment, or the payor may tender the articles at any reasonable place, and notify the payee thereof. The right of the payee to elect the place of delivery in such cases, is not a condition precedent, but a mere privilege, which he may waive by a neglect to exercise it. Peck *v.* Hubbard, 11 Vermont, 612; overruling Basset *v.* Kerne, 1 Leon. 69; and see Taylor *v.* Gallup, 8 Vermont, 340; Townsend *v.* Wells, 3 Day, 327; Russell *v.* Ormsbee, 10 Vermont, 274.

(*y*) Co. Litt. 210, b; Barr *v.* Myers, 3 W. & S. 295; Howard *v.* Miner, 20 Maine, 325; Bixby *v.* Whitney, 5 Greenl. 192; Bean *v.* Simson, 16 Maine, 49; Mingus *v.* Pritchet, 3 Dev. 78; Roberts *v.* Beatty, 2 Penn. 63.

have the right to designate to the deliverer, a reasonable time beforehand, a place of delivery reasonably convenient to both parties, and the deliverer would be bound by such direction. (*z*) If no place is indicated, and the deliverer is not in fault in this, he may deliver the chattels to the receiver, in person, at any place which is reasonably convenient. (*a*) And if the deliverer be under an obligation to seek or notify the receiver, he need not follow him out of the State for this purpose, for he is only bound to reasonable diligence and efforts. (*b*) And if the receiver refuses or neglects to appoint a place, or purposely avoids receiving notice of a place, the deliverer may appoint any place, with a reasonable regard to the convenience of the other party, and there deliver the articles. (*c*) But though he is not obliged to follow the receiver out of the State, yet if the receiver live out of the State, or even out of the United States, this perhaps does not exempt him from the obligation of inquiring from him where the chattels shall be delivered; (*d*) and the same rule seems to hold if the promisor lives out of the United States and the promisee within. (*e*)

If no expressions used by the parties, and nothing in the nature of the goods or the circumstances of the case controls the presumption, then the place where the promise is made is the place where it should be performed. Nor will an action be maintainable upon such a promise, without evidence that the promisee was ready at that place and at the proper time to receive the chattel, or that the promisor was unable to deliver it at that place and time. (*f*) The plaintiff must

(*z*) Howard *v.* Miner, 20 Maine, 325; Aldrich *v.* Albee, 1 Greenl. 120.

(*a*) Howard *v.* Miner, 20 Maine, 325.

(*b*) Co. Litt. 210; Smith *v.* Smith, 25 Wend. 405, 2 Hill, 351; Howard *v.* Miner, 20 Maine, 325.

(*c*) Id.

(*d*) Bixby *v.* Whitney, 5 Greenl. R. (Bennett's Ed.) 192.

(*e*) White *v.* Perley, 15 Maine, 470. But *quære* if the two preceding cases can be reconciled with the cases and authorities cited *supra*, n. (*b*.)

(*f*) But in a note payable in specific articles at *a certain time and place*, it has been *held* the plaintiff may maintain his action without proving a demand at the time and place. If the defendant was there ready and willing to comply with the contract, that might be a good defence to the action; but that must come in by way of defence; and on failure of such proof, the plaintiff may recover the amount of his note in money. Fleming *v.* Potter, 7 Watts, 380. And see Thomas *v.* Roosa, 7 Johns. R. 461; Townsend *v.* Wells, 3 Day, 327; White *v.* Perley, 15 Maine, 470; Games *v.* Manning, 2 Greene, 251.

show a demand, or a readiness to receive, and notice equivalent to a demand, or else that the demand must have been nugatory, because the defendant could not have complied with it.

If the promise be to pay money at a certain time, or deliver certain chattels, it is a promise in the alternative; and the alternative belongs to the promisor. (*g*) He may do either the one or the other, at his election; nor need he make his election until the time when the promise is to be performed; but after that day has passed without election on his part, the promisee has an absolute right to the money, and may bring his action for it. (*h*)

A contract to deliver a certain quantity of merchandise at a certain time, means, of course, to deliver the whole then; (*i*) and such is its meaning, though the delivery is to be made on an event which may happen at one time as to one part, and at another time as to another; as on its arrival at a certain port; for if a part only arrives there, the promisor

(*g*) A promise to pay a certain sum in money, at a certain time, but "which may be discharged in good leather," is a conditional contract, leaving the debtor the *option* of paying in that manner if he elect, *at the time of payment.* It is a condition for the debtor's benefit, and he should notify the other party of his desire to pay in leather, or the right to the money becomes absolute. Plowman *v.* McLane, 7 Ala. 775. If the leather rises in value, the debtor is not *bound* to pay in that article. Ib. If the specific property is not delivered at the time and place agreed upon, and this without the fault of the payee, his right to recover the money is absolute. Stewart *v.* Donelley, 4 Yerger, 177. And the payee is not bound to receive the property *before* the day of payment. Orr *v.* Williams, 5 Humph. 423. In Gilman *v.* Moore, 14 Vermont, 457, the note was payable "in the month of February;" the property was set apart on the last day of January, and kept there in a suitable condition from that time through the month of February. The tender was adjudged sufficient to pass the property and extinguish the debt.

(*h*) Townsend *v.* Wells, 3 Day, 327. This was an action on a note for $80, payable in rum, sugar, or molasses, at the election of the *payee*, within eight days after date. It was *held* not necessary to prove that the payee made his election and gave notice thereof to the maker, but that if the defendant did not tender *either* of the articles within eight days, he became immediately liable on his note, and the amount might be recovered in money. And see Roberts *v.* Beatty, 2 Penn. 63; Wiley *v.* Shoemak, 2 Greene, 205; Church *v.* Feterow, 2 Penn. 301; Vanhooser *v.* Logan, 3 Scam. 389; Elkins *v.* Parkhurst, 17 Verm. 105. If a promise be in the alternative to deliver one article at one place, or another article at another place, at the election of the *debtor*, he ought to give the creditor reasonable notice of his election. Aldrich *v.* Albee, 1 Greenl. (Bennett's Ed.) 120.

(*i*) Roberts *v.* Beatty, 2 Penn. 63. If however the party accepts a part without objection, he thereby disaffirms the entirety of the contract, and is liable to pay for so much as he receives, id.; Oxendale *v.* Wetherell, 9 B. & C. 386; Booth *v.* Tyson, 15 Verm. 515; Bowker *v.* Hoyt, 18 Pick. 555. Deducting, it seems, any damage sustained by the non-fulfilment of the contract. Ib. And see *ante*, p. 32, *et. seq.*

is not bound to deliver, (*j*) nor if he tenders is the promisee bound to receive, such part. The contract is entire, and the obligation of each party is entire. But as it is certainly competent for them to contract that a part shall be delivered at one time, and a part at another, so, this construction may be given to a contract, either by its express terms, or by such facts and circumstances in the transaction, or in the nature of the chattels to be delivered, as would distinctly indicate this as the meaning and intention of the parties.

Whenever chattels are deliverable by contract on a demand, this demand must be reasonable; that is, reasonable in time, and place and manner. (*k*) And the conduct of the promisor will always receive a reasonable construction. Thus, in general, if a proper demand be made upon him, his silence will be held equivalent to a refusal to deliver the chattels. (*l*) And by an application of the same universal principle, all the obligations of both parties receive a reasonable construction. Thus, if the promise be to do within a certain time a certain amount of labor on materials furnished, they must be furnished in season to permit that work to be done within that time, by reasonable exertions. (*m*) And if certain work is to be done, that certain other work may be done, all to be completed and the whole delivered within a certain period, the work first to be done, must be finished early enough to permit the other work to be done in season. (*n*)

If by the terms of the contract, certain specific articles are to be delivered at a *certain time* and *place*, in payment of an existing debt, this contract is fully discharged, and the debt is paid, by a complete and legal tender of the articles at the time and place, although the promisee was not there to receive them, and no action can be thereafter maintained on

(*j*) Russell *v.* Nicoll, 3 Wend. 112.

(*k*) Higgins *v.* Emmons, 5 Conn. 76.

(*l*) Higgins *v.* Emmons, 5 Conn. 76. And see Dunlap *v.* Hunting, 2 Denio, 643.

(*m*) Clement *v.* Clement, 8 N. H. 210. So where the debtor was to deliver at his factory a certain quantity of salt, to be packed in barrels; which were to be delivered at the factory by the *creditor*, but which was not done in due time, the court held that the debtor was not bound to deliver the salt, *in bulk*, at least, not unless he had received notice that the creditor waived the *packing* of the salt, and would receive the salt in bulk, in full discharge of the contract. Goodwin *v.* Holbrook, 4 Wend. 377.

(*n*) Clement *v.* Clement, 8 N. H. 210.

the contract. (*o*) But the property in the goods has passed to the creditor, and he may retain them as his own. (*p*)

(*o*) Mitchell *v.* Merrill, 2 Blackf. 87; Slingerland *v.* Morse, 8 Johns. 474. In this last case the *time* of the delivery was rendered certain by the contract, but no *place*. The debtor tendered the property at the place where it was, (it being cumbrous articles) but the creditor refused to receive it there, and then appointed another place, but the same not being delivered, he brought his action on the contract, which was either to deliver the property or pay a certain sum of money. The tender was held to be a *bar* to the action, and the creditor was held bound to resort to the specific articles tendered, and to the person in whose possession they were. See also Curtiss *v.* Greenbanks, 24 Verm. 536; Zinn *v.* Rowley, 4 Barr. 169; Games *v.* Manning, 2 Greene, 254. Garrard *v.* Zachariah, 1 Stewart, 272, is to the same effect. Case *v.* Green, 5 Watts, 262, is a strong case to the same point. There the creditor was prevented by sickness from attending at the time and place designated, to receive the articles. The debtor had the property there and left it on the ground. The creditor afterwards brought suit on the *contract*, and the tender was held a good bar. See also Lamb *v.* Lathrop, 13 Wend. 95, which also holds, that if the tender be not accepted, the creditor cannot, by a subsequent demand and refusal, revive his right to sue upon the contract; for the debtor is not bound, as in tender of money, to keep his tender always ready. After such tender, he is but a *bailee* of the property for the creditor, and his rights and duties are the same as those of other bailees. Some cases hold that a tender under the circumstances stated in the text, must always be kept good, and that a plea averring that the debtor was ready at the time and place to deliver the articles, but that the payee did not come to receive them, is bad, for not averring that the debtor was always and still is ready to deliver the same. Nixon *v.* Bullock, 9 Yerger, 414; Tiernan *v.* Napier, Peck, 212; Miller *v.* McClain, 10 Yerger, 245; and *dicta* in Roberts *v.* Beatty, 2 Penn. 63. But this, as we have seen, is not the generally recognized rule. The tender, however, must be such as to vest the property in the creditor. The articles should be so set apart, and designated, as to enable the payee to distinguish and know them from all others. The absence of the payee alone will not dispense with such designation and separation by the debtor. The fact that the latter had the articles at the time and place, *ready* to be delivered if the other party had been present, is not alone a sufficient tender to vest the property in the other party, or to bar an action on the contract. Smith *v.* Loomis, 7 Conn. 110. In this case *Peters*, J., said: — "Though we find much confusion and contradiction in the books on this subject, our own practice seems to have been uniform for nearly sixty years, and establishes these propositions, — 1. That a debt payable in specific articles, may be discharged by a tender of these articles, at the proper time and place. 2. That the articles must be set apart and designated so as to enable the creditor to distinguish them from others. 3. That the property so tendered vests in the creditor, and is at his risk. 4. That a tender may be made in the absence of the creditor." And see McConnel *v.* Hall, Brayton, 223; Newton *v.* Galbraith, 5 Johns. 119; Barns *v.* Graham, 4 Cowen, 452; Nichols *v.* Whiting, 1 Root, 443. After *such* tender, the property vests in the creditor, and he may maintain trover for the same. Rix *v.* Strong, 1 Root, 55.

(*p*) See preceding note. In the celebrated case of Weld *v.* Hadley, 1 N. H. 295, a different doctrine was declared. It was there *held* that when a creditor, to whom a tender of specific articles is made in pursuance of a contract, refuses to accept the tender, he acquires no property in the articles tendered, though the contract is discharged by such tender. That was an action of trover for leather. It appeared that Hadley gave Weld a note, dated August 9, 1808, for $300 dollars, payable in good merchantable leather at cash price, in two years from January 1, 1809. When the note became due, Hadley tendered to the plaintiff a quantity of leather, but a dispute arose as to the price of leather, and Weld thinking the quantity not sufficient to pay the note, refused to receive it, and Hadley took it away and

These two things go together. If the contract and its obligation are discharged by the tender, the property in the chat-

used it. Weld then brought a suit upon the note; Hadley pleaded the tender in bar, and issue being joined upon the tender, the jury found that a sufficient quantity was tendered, and judgment was rendered in favor of Hadley. After that suit was determined, Weld demanded the leather of the defendant, and tendered the expenses of keeping. Hadley refused to deliver the leather, and thereupon this suit was brought. The case was argued with great ability on both sides. And *Richardson*, C. J., in delivering the judgment of the court, said: — "The plaintiff cannot prevail in this action, unless he has shown a legal title to the leather, which is the subject of contest, vested in himself. The question then to be decided is, whether upon the tender of the leather by the defendant in pursuance of his contract, the property vested in the plaintiff, notwithstanding his refusal to accept it. It therefore becomes necessary to look into the nature and consequences of a tender and refusal. In some cases the debt, or duty is discharged by a tender and refusal; and in other cases it is not. . . . . In an obligation with condition for the delivery of specific articles, a tender and refusal of the articles is a perpetual discharge. Thus if a man make an obligation of £100, with condition for the delivery of corn, timber, &c., or for the performance of an award, or the doing of any act, &c., this is collateral to the obligation, and a tender and refusal is a perpetual bar. Co. Litt. 207; 9 Co. 79, II. Peytoe's case. So if a man be bound in 200 quarters of wheat for delivery of 100 quarters of wheat, if the obligor tender at the day the 100 quarters, he shall not plead *uncore prist*, because albeit it be parcel of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. Co. Litt. 207. From a remark of Coke upon this example of an obligation for the delivery of wheat, it is very clear, that he was of opinion, that the obligee had no remedy to recover the wheat tendered. For he says, 'and the reason wherefore in the case of an obligation for the payment of money, the sum mentioned in the condition is not lost by the tender and refusal, is not only for that it is a duty and parcel of the obligation, *and therefore* is not lost by the tender and refusal, but also for that the obligee hath remedy by law for the same.' This remark has no point whatever, unless the wheat is to be considered as lost by the tender and refusal. In the case of an obligation or contract for the delivery of specific articles, &c., the duty is not discharged by a tender or refusal, *because* any title to the thing tendered vests in him who refuses it, for in that case the condition or contract must be considered as performed, and should be so pleaded, but *because* the defendant having done all in his power to perform the condition or contract, and having been prevented by the fault of the other party, the non-performance is by law excused. This is evident from many cases that are to be found in the books." The learned judge then cites and comments upon several cases, and continues, "It is believed, that it may with great safety be affirmed that there is nothing in the *English* books, nor in the decisions of our own courts, that gives the least countenance to the supposition that when specific articles are tendered and refused, the property still passes. It seems, however, that a different opinion formerly prevailed in Connecticut. 1 Root, 55 and 443; 1 Swift's Syst. 404. But it seems to have been formed without due consideration, and stands wholly unsupported by authority. Nor are we able to learn either from Swift or Root, the grounds of the decision. It also seems from some remarks made by individual judges in the case of Slingerland *v.* Morse, 8 Johns, 474; and in Coit & Al. *v.* Houston, 3 Johns. Cas. 242, that an opinion is entertained in *New York* that property may pass upon a tender and refusal. But in neither of those cases was that the point before the court, and although we entertain the highest respect for the talents and legal learning of the judges who seem to have intimated such an opinion, we cannot rely upon their *obiter dicta* on points not before them, in opposition to the whole current of authorities from the earliest times. It has also been contended on the part of the plaintiff, that there is a strong analogy between this case and the case of an abandonment upon a

tels passes by the tender; and on the other hand, if the property passes by the tender, the contract is discharged. And therefore, whenever a tender would discharge the contract,

policy of insurance, when the property often vests in the underwriter notwithstanding his refusal to accept the abandonment. But we think that the answer which the defendant's counsel has given to this argument is decisive, and that the vesting of property in case of an abandonment depends upon circumstances peculiar to that species of contract, and that the supposed analogy fails altogether. Thus it seems that the doctrine for which the plaintiff contends is not only wholly unsupported by any adjudged case, which is entitled to have any weight in the decision, but stands contradicted by the whole current of authorities from the earliest to the present time. The principle to be deduced from adjudged cases of the most unquestionable authority, is, undoubtedly, that a tender and refusal of specific articles transfers no property. Nor does this principle rest upon reasons in any degree unsatisfactory, nor can it prejudice any party to whom a tender is made, provided he takes care to be well instructed as to his rights and duties, and to act with good faith. In the present case when the leather was tendered, the plaintiff had a right to take a reasonable time to examine the tender, and to ascertain the quality and quantity of the leather tendered. If upon examination he found the tender sufficient, it was his duty to have accepted it; but if on the contrary he found it deficient, he had a right to reject it, and demand of the defendant a fulfilment of the contract according to its terms; but as on the one hand the defendant was bound at his peril to make a sufficient tender, so on the other hand the plaintiff refused the tender, if sufficient, at his own peril. This was no hardship upon the plaintiff. He could as easily ascertain whether the tender was sufficient as the defendant could. The advantage which the defendant has in being discharged from his obligation, and still keeping the leather, is merely accidental. When the plaintiff wrongfully rejected the leather, the defendant might have left it in the street, and have suffered it to have been lost or destroyed, and in so doing he would have done no injury to the plaintiff; but the law did not compel him to do this, which would have been an idle waste of property, but permitted him to keep it; nor did the law impose the duty upon the defendant of being at the trouble and expense of keeping it for the use of the plaintiff, who had refused it, but permitted him to have it to his own use. And there is no reason why the plaintiff should now recover the value of the leather from the defendant, any more than there would have been, had the defendant left the leather in the street, and permitted it to be destroyed, as it might have been, if he had not kept possession of it. There may be more hazard in rejecting a sufficient tender than in not making a sufficient one, because the one is done at the peril of losing the debt, the other is only at the peril of being compelled to pay the money in lieu of specific articles. But the plaintiff has no reason to complain of this inequality, for it was his own choice to take the hazard, and he has lost his debt by his own act. In this case the dispute between the parties seems to have been whether the quantity of leather was sufficient, and that question depended upon what was the cash price of leather. Had the plaintiff been well advised, he would not have rejected the tender at the risk of his debt, but would have received the leather and indorsed the quantity upon the note. He might then have brought an action upon the note to recover the balance, and have settled the question without incurring any hazard but that of costs. But he saw fit to take a different course. This was probably done through an innocent mistake, and if so, it was his misfortune, but cannot alter the law. However innocent the mistake may have been he has no right to ask an indemnity from the defendant, who seems to have been in all things equally innocent. And as he chose to exact of the defendant a rigid compliance with the terms of the contract, he must not complain if the defendant now choses to shield himself under the rigid rules of the law." But this decision has not been approved of, and it probably would not now be considered as law in any jurisdiction.

it must be so complete and perfect, as to vest the property in the promisee, and give him instead of the *jus ad rem* which he loses, an absolute *jus in re.* (*q*)

3. *Of the kind of performance.*

When the defence against an action on a contract is performance, the question sometimes arises whether the performance relied upon has been of such a kind as the law requires. The only general rule upon this point is, that the performance must be such as is required by the true spirit and meaning of the contract, and the intention of the parties as expressed therein. A mere literally accurate performance may wholly fail to satisfy the true purpose of the contract; and such a performance is not enough, if the true purpose of the contract can be gathered from it, according to the established rules of construction. Thus a contract for the conveyance of real estate, is satisfied only by a valid conveyance with good title. (*r*) But if the contract expresses and defines the exact method of conveyance, and that method is accurately followed, although no good title passes, this is a suffi-

(*q*) Questions often arise as to the *quality* of articles to be tendered. Generally a contract to pay a certain sum in the wares of a particular trade, means such as are entire, and of the kind and fashion in ordinary use, and not such as are antiquated or unsalable. Dennett *v.* Short, 7 Greenl. (Bennett's Ed.) 150. The tender, to be valid, must be of such quality and kind of the articles as would be necessary to make a legal sale. Thus when a statute required all leather offered for sale to be stamped G. or B., a tender of unstamped leather is not sufficient. Elkins *v.* Parkhurst, 17 Vermont, 105. So if the law requires the article to be packed in a certain manner. Clark *v.* Pinney, 7 Cowen, 681. A contract to deliver *good coarse salt* is fulfilled by a delivery of coarse salt of a medium quality, of the kind generally used at the place and time of delivery. Goss *v.* Turner, 21 Vermont, 437. In Crane *v.* Roberts, 5 Greenl. (Bennett's Ed.) 419, there was a contract to deliver such hay as B. should say was "*merchantable.*" That which he did deliver, B. called "a fair lot, say merchantable, not quite so good as I expected; the outside of the bundles some damaged by the weather."—*Held* no compliance with the contract.

(*r*) Smith *v.* Haynes, 9 Greenl. (Bennett's Ed.) 128. Here the agreement was "to sell certain land." It was held to be an agreement also to "convey" the land; but it was not determined whether the deed should contain a warranty or not. In Brown *v.* Gammon, 14 Maine, 276, the contract was "to convey a certain tract of land, the title to be a good and sufficient deed;" and this was held to be a contract to give a good title by deed. Lawrence *v.* Dole, 11 Vermont, 549, bears upon the same point. It was there held that if the contract be "to convey the land by a deed of conveyance," for a stipulated price, this is not fulfilled by executing a deed of conveyance merely. The party must be able to convey such a title as the other party had a right to expect,

cient performance. (*s*) But if the expression is, "a good and sufficient deed," the deed must not only be good and sufficient of itself, but it must in fact convey a good title to the land, because otherwise it would not be sufficient for the purpose of the contract. (*t*)

If the contract be in the alternative, as to do a thing on one day or another, or in one way or another, the right of election is with the promisor if there be nothing in the contract to control the presumption. (*u*) It is an ancient rule, that "in case an election be given of two several things,

and this is to be determined by the fair import of the terms used with reference to the subject-matter. *Redfield*, J., said, "The contract is, not to execute a deed merely, but to *convey*, by a deed, &c., *a certain tract of land*. Could language be more explicit? What is implied in conveying land? Surely, that the title shall be conveyed." But it has been held in Ohio that a contract for a *good title* was discharged by a tender of a quitclaim deed, the grantor having the whole title. Pugh *v.* Chesseldine, 11 Ohio, 109.

(*s*) Hill *v.* Hobart, 16 Maine, 164; per *Redfield*, J., in Lawrence *v.* Dole, 11 Verm. 554. In Tinney *v.* Ashley, 15 Pick. 546, the obligors undertook to execute and deliver a "good and sufficient warranty deed" of certain land; and the court *held* that the words "good and sufficient" were to be applied to the *deed* and not to the title, and that the condition was performed by making and delivering a deed good and sufficient in *point of form* to convey a good title, the remedy for any defect, being upon the covenant of warranty in the deed; but see next note.

(*t*) Tremain *v.* Liming, Wright, 644. It was held that the words "good and sufficient deed" meant a deed of warranty conveying a fee-simple; and a deed without warranty, and not signed by the obligor's wife, was held no compliance with the contract. In Hill *v.* Hobart, 16 Maine, 164, the contract was to make and execute "a good and sufficient deed *to convey the title;*" this was held not to be performed unless a good title passed by the deed. In this case also the distinction in the text was recognized, that if the contract is for the *conveyance* of land, or for a *title* to it, performance can be made only by the conveyance of a good title. But when it stipulates only for a deed, or for a conveyance by a deed described, it is performed by giving such a deed as is described, however defective the title may be. That the words "good and sufficient," when used as descriptive of a deed, have reference to the title to be conveyed, and not to the mere form of the deed, see Fletcher *v.* Button, 4 Comst. 396; Clute *v.* Robinson, 2 Johns. 595; Judson *v.* Wass, 11 Johns. 525; Stow *v.* Stevens, 7 Verm. 27. But see Aiken *v.* Sanford, 5 Mass. 494; Gazley *v.* Price, 16 Johns. 268; Parker *v.* Parmele, 20 id. 130; Stone *v.* Fowle, 22 Pick. 166. See also Tinney *v.* Ashley, 15 Pick. 546, cited in preceding note. In this last case the court lay considerable stress on the fact that the deed was to contain a covenant of warranty, which showed that the party intended to look at that as his muniment of title.

(*u*) Smith *v.* Sanborn, 11 Johns. 59; Layton *v.* Pearce, Dougl. 16, per Lord *Mansfield*; Small *v.* Quincy, 4 Greenl. (Bennett's ed.) 497. In this case A. contracted to deliver "from one to three thousand bushels of potatoes," and he was allowed the right to deliver any quantity he chose within the limits of the contract. And see McNitt *v.* Clark, 7 Johns. 465; 13 Edw. IV., 4 pl. 12. If the contract is to do one of two things by a given day, the debtor has until that day to make his election; but if he suffer that day to pass without performing either, his contract is broken and his right of election gone. Choice *v.* Moseley, 1 Bailey, 136; McNitt *v.* Clark, 7 Johns. 465.

always he that is the first agent, and which ought to do the first act, shall have the election." (*v*) But this same rule may give the election to the promisee, if something must first be done by him to create the alternative. (*w*) If one branch of the alternative becomes impossible, so that the promisor has no longer an election, this does not destroy his obligation, unless the contract expressly so provide; but he is now bound to perform the other alternative. (*x*) An agreement may be altogether optional with one party, and yet binding on the other. (*y*)

4. *Of part performance.*

A partial performance may be a defence, *pro tanto*, or it may sustain an action, *pro tanto;* but this can be only in cases where the duty to be done consists of parts which are distinct and severable in their own nature, (*z*) and are not

(*v*) Co. Litt. 145, *a*.

(*w*) Chippendale *v.* Thurston, 4 C. & P. 98.

(*x*) Stevens *v.* Webb. 7 C. & P. 60.

(*y*) Thus, where A. agreed to deliver to B. by the 1st of May, from 700 to 1,000 barrels of meal, for which B. agreed to pay on delivery at the rate of six dollars per barrel, and A. delivered 700 barrels, and also before the day tendered to B. 300 barrels more, to make up the 1,000 barrels, which B. refused; it was held that B. was bound to receive and pay for the whole 1,000 barrels; the delivery of any quantity between 700 and 1,000 barrels, being at the option of A. only, and for his benefit. Deaborough *v.* Neilson, 3 Johns. Cas. 81.

(*z*) Thus in an entire contract of sale, or manufacture of a large quantity of an article or articles, at an agreed price for each, the current of authorities hold that a delivery and acceptance of part, gives a right to recover for that part, deducting whatever damages the other party sustained by the non-fulfilment of the contract. Bowker *v.* Hoyt, 18 Pick. 555, a sale of 1,000 bushels of corn at 85 cents *per bushel*. The plaintiff delivered only 410 bushels, and refused to deliver the remainder; the vendee kept what he had received, and was held bound to pay for it, deducting his damages. Oxendale *v.* Wetherell, 9 B. & C. 386, was a sale of 250 bushels of wheat at 85 cents per bushel. The vendor delivered only 130 bushels, when corn having advanced, he refused to deliver the remainder. *The Jury found the contract to be entire*, but as the vendee had retained the corn delivered, until after the expiration of the time for the completion of the contract, the whole Court of King's Bench held him liable for the same. Champion *v.* Short, 1 Campb. 53, is to the same effect. There the defendant, who resided at Salisbury, ordered from the plaintiff, a wholesale grocer in London, "half a chest of French plums, two hogsheads of raw sugar, and 100 lumps of white sugar; to be all sent down without delay." The plums and raw sugar arrived nearly as soon as the course of conveyance would permit; but the white sugar not coming to hand, the defendant countermanded it, and gave notice to the plaintiff that as he had wished to have the two sorts of sugar together, or not at all, he would not accept of the raw. The plums the defendant used, and this action having been brought to recover the price of the plums and the raw sugar, he tendered the price of the plums; and at the trial the question

bound together by expressions giving entirety to the contract. It is not enough that the duty to be done is itself severable, if the contract contemplates it only as a whole. (*a*)

was whether he was liable to pay for the sugar. And, per Lord *Ellenborough*, "Where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. I may wish to have articles A, B, C, and D, all of different sorts and of different values; but without having every one of them as I direct, the rest may be useless to me. I therefore bargain for them jointly. Here, had the defendant given notice that he would accept neither the plums nor the raw sugar, as without the white sugar they did not form a proper assortment of goods for his shop, he might not have been liable in the present action; but he has completely rebutted the presumption of a joint contract, including all the articles ordered, by accepting the plums, and tendering payment for them. Therefore, if the raw sugar was of the quality agreed on, and was delivered in reasonable time, he is liable to the plaintiff for the price of it." And see Barker *v.* Sutton, 1 Campb. 55, n. Bragg *v.* Cole, 6 Moore, 114; Shaw *v.* Badger, 12 S. & R. 275, recognize the same rule. In Booth *v.* Tyson, 15 Verm. 515, the contract was to mould for the defendant two hundred stove patterns; only a part was ever made, which the defendant used and disposed of, *as they were made*. The plaintiff gave up the contract without completing it; but he was allowed to recover on a *quantum meruit*, deducting the damages to the other party. In Mavor *v.* Pyne, 3 Bing. 285, also, it was held that a contract to publish a work in numbers, at so much *a number*, meant that each number should be paid for *as delivered*. Shipton *v.* Casson, 5 B. & C. 378, holds also that an acceptance of part under an entire contract, gives a right of action for such part, although in accordance with the suggestions in that case it may be questioned whether the plaintiff can sustain an action for part, until after the expiration of the time for the delivery of the *whole;* for perhaps the vendee may conclude to return what he has received unless the whole is delivered, which cannot be known until the time has expired. See Waddington *v.* Oliver, 5 B. & P. 61. The New York Courts adopt a different doctrine, and hold that part performance, although accepted, furnishes no ground of recovery *pro tanto*, and repudiate the doctrine of Oxendale *v.* Wetherell, *supra*. Champlin *v.* Rowley, 13 Wend. 258, 18 id. 187; Mead *v.* Degolyer, 16 Wend. 632; Paige *v.* Ott, 5 Denio, 406; Knight *v.* Dunlop, 4 Barb. 36; and see *ante*, p. 35, n. (*d*).

(*a*) The most frequent cases where the entirety of a contract is sustained as a good defence in law to an action for part performance, are, perhaps, contracts of labor and service for a *fixed time*. Here the current of authorities agree that part performance gives no right to part compensation, unless the fulfilment of the contract is prevented by the act of the obligee. Cutter *v.* Powell, 6 T. R. 320, is well known as the leading case on this subject. There a sailor had taken a note from the master of a vessel to pay him 30 guineas, "provided he *proceeded, continued*, and did his duty as second mate *from Jamaica to Liverpool*." The sailor died on the voyage, and his administrator was not allowed to recover anything for the service actually performed. But as the sailor was by the contract to receive about four times as much provided he completed the voyage as was generally paid for the same service without any special contract, this fact might have had much influence upon the court in determining this contract to be entire, and not apportionable. But in this country, sickness or death of the laborer has been frequently held a sufficient excuse for non-performance of the whole contract, and the laborer, or his administrator may recover for the service actually rendered. Fenton *v.* Clark, 11 Vermont, 557; Dickey *v.* Linscott, 20 Maine, 453; Fuller *v.* Brown, 11 Mete. 440. The same rule has been applied where the non-performance was caused by the act of law. Jones *v.* Judd, 4 Comst. 412. See *ante*, vol. 1, p. 524, n. (*o*). Although in the same courts the general rule is fully recognized, and constantly acted upon, that part performance of such a contract gives no right to part payment, if the non-per-

If money is to be paid when work is done, and an action be brought for the money, non-performance of the work is of course a good defence; but if there is a part performance, and this is a performance of the whole substance of the contract, and an omission only of what is incidental and unimportant, (*b*) it is a sufficient performance; but the contract may expressly and in especial terms provide that these formal, incidental and non-essential parts shall be done, and then they are made by the parties, matters of substance. Thus, if a time be set in which certain work is to be done, it is not in general so far of the substance of the contract, that if the work be done, but not until some days later, no compensation will be recovered; but an action for the price will be sustained, leaving the defendant to show any injury he has sustained by the delay, and use it in reduction of damages, by way of set-off, or to sustain a cross action according to the circumstances of the case. (*c*) But if the parties see fit to stipulate in unequivocal language, that no money shall be paid for the work unless it is done within a fixed time, both parties will be bound by their agreement. (*d*)

formance is voluntary on the part of the plaintiff, and not caused by the defendant or by an act of God. See St. Albans St. Co. *v.* Wilkins, 8 Vermont, 54. Hair *v.* Bell, 6 Vermont, 35; Philbrook *v.* Belknap, 6 Vermont, 383; Brown *v.* Kimball, 12 Vermont, 617; Ripley *v.* Chipman, 13 Vermont, 268; Stark *v.* Parker, 2 Pick. 267; Olmstead *v.* Beale, 19 Pick. 528. And see *ante*, vol. 1, p. 522, n. (*l*), and *ante*, p. 35, n. (*d*). So if rent is to be paid quarterly, and during a quarter the lessee delivers up, and the lessor accepts possession of the premises, without anything said about rent *pro rata*, none is payable. Grimman *v.* Legge, 8 B. & C. 324.

(*b*) Thus, in Gilman *v.* Hall, 11 Vermont, 510, A. contracted to build $60 worth of stone wall for B. of a given *length*, *height*, and *thickness*. He built a wall worth $60, but in some parts it was not of the given *height*, the deficiency being made up in extra *length*. He was allowed to recover on a *quantum meruit*, on the ground that there had been a *substantial* compliance. See also Chambers *v.* Jaynes, 4 Barr, 39, that a substantial *bonâ fide* compliance is all that is necessary. And see *ante*, p. 35, n. (*d*).

(*c*) Thus in Lucas *v.* Godwin, 3 Bing. N. C. 737, A. contracted to finish some castings by the 10th of October. They were not finished until the 15th. The defendant then accepted them, and he was held bound to pay on a *quantum valebant*. See also Porter *v.* Stewart, 2 Aikens, 47; Warren *v.* Mains, 7 Johns. 476; Lindsey *v.* Gordon, 13 Maine, 60; Smith *v.* Gugerty, 4 Barbour, 614. But in most or all of these cases it is to be noted that there had been an acceptance by the defendant after the time stipulated in the contract. See *ante*, p. 35, n. (*d*).

(*d*) Kemp *v.* Humphreys, 13 Ill. 573; Westerman *v.* Means, 12 Penn. St. 97; Liddel *v.* Sims, 9 Sm. & Marsh. 596; Tyler *v.* McCardle, id. 230. In Sneed *v.* Wiggins, 3 Geo. 94, A. recovered two judgments against B., who being about to appeal, A. agreed in writing that if he would not appeal, he, A., would give certain time for the payment of the amount due by instalments, "provided

Although even then the promisee would not be permitted to receive and retain the work after the due time of delivery, and make no compensation. Either his acceptance would amount to a waiver of the condition of time, or the other party might have his action on a *quantum meruit.*

5. *Of the time of performance.*

If the contract specifies no time, the law implies that it shall be performed within a reasonable time ; (*e*) and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. (*f*) What is a reasonable time is a question of law. (*g*) And if the contract specify a place in which arti-

that if any of the instalments should not be paid at the time specified, then A. should proceed with his execution." *Held*, that time was of the essence of the contract ; and that B. having failed to pay one of the instalments when due, was not entitled to relief in equity.

(*e*) Sansom *v.* Rhodes, 8 Scott, 544. In this case the defendant put up property for sale by public auction on the 18th September, subject (amongst others) to the following conditions— that the purchaser should pay down a deposit of 10 per cent. and sign an agreement for payment of the remainder of the purchase-money on or before the 28th November ; that a proper abstract should be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the conditions ; the conveyance to be prepared by and at the expense of the purchaser, and left at the office of the vendor's solicitors for execution on or before the 10th November ; and that all objections to the title should be communicated to the vendor's solicitors within twenty-eight days after the delivery of the abstract. In an action by the purchaser to recover back the deposit on the ground that the vendor had not deduced a good title by the 28th of November :—*Held*, on special demurrer, that the declaration was bad for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action, the conditions of sale naming no specific time for *that* purpose. *Tindal*, C. J., said : — " There does not appear on the face of the declaration to have been any express stipulation that the vendor should deduce a good title by any specific time ; and, if no express time was stipulated, the law will in this, as in every other case, imply that a reasonable time was intended. Inasmuch, however, as it is not alleged in the declaration that a reasonable time for deducing a good title had elapsed, I think the demurrer must prevail, and consequently that the defendant is entitled to judgment." Atwood *v.* Cobb, 16 Pick. 227 ; Roberts *v.* Beatty, 2 Penn. 63 ; Philips *v.* Morrison, 3 Bibb. 105 ; Cocker *v.* Franklin Man. Co., 3 Sumner, 530 ; Atkinson *v.* Brown, 20 Maine, 67. And see *ante*, p. 47, n. (*w*).

(*f*) *Shaw*, C. J., in Atwood *v.* Cobb, 16 Pick. 227. Unless it be in connection with other facts as tending to show what is a reasonable time under the circumstances of the case. Cocker *v.* Franklin Man. Co., 3 Sumner, 530 ; Ellis *v.* Thompson, 3 M. & W. 445. And see *ante*, p. 65, n. (*w*).

(*g*) Stodden *v.* Harvey, Cro. Jac. 204, where the court *held* that the executor of a lessee for life had a reasonable time after his death to remove his goods, and that six days was reasonable. So in Ellis *v.* Paige, 1 Pick, 43, it was considered as a question for the court, what was a reasonable time for a tenant at

cles shall be delivered, but not a time, this means that they are deliverable on demand, but the demand must be sufficient to enable the promisor to have the articles at the appointed place with reasonable convenience. (*h*) If any period, as a month, be expressed, the promisor has a right to the whole of it. There is, perhaps, no exact definition, and no precise standard of reasonable time. The true rule must be, that that is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer. Thus, in a case of guaranty, if the principal fails to pay when he should, the guarantor must be informed of the failure within a reasonable time; that is to say, soon enough to give him such opportunities as he ought to have to save himself from loss. If therefore the notice be delayed but a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But if the delay were for a long period, for months, and possibly for years, and it was nevertheless clear that the guarantor could have derived no benefit from an earlier notice, the delay would not impair his

will to quit after receiving notice, and that ten days was not enough. And where the maker of a note deposited goods with the holder to be sold to pay it, the court *held* that a sale several years afterwards was not within a reasonable time. Porter *v.* Blood, 5 Pick. 54. Likewise in Doe *v.* Smith, 2 T. R. 436, where a lessor reserved in the lease a right for his son to terminate the lease, and to take possession upon coming of age, the court determined that a week or a fortnight after coming of age, would have been a reasonable time, but that a year was not. On the same principle it has been held to be a question for the court whether notice of abandonment was given within a reasonable time after intelligence of the loss, and that five days was an unreasonable delay. Hunt *v.* Royal Ex. Ass. Co., 5 M. & S. 47. In Attwood *v.* Clark, 2 Greenl. (Bennett's Ed.) 249, the purchaser of a crate of ware was to furnish the vendor with a list of the broken articles; and it was held that the court must decide whether it was or was not done in a reasonable time. See also Murry *v.* Smith, 1 Hawks, 41; Kingsley *v.* Wallis, 14 Maine, 57. It is not *always* a question for the court what is reasonable time; for if the facts are not clearly established, or if the question of time depends upon other controverted facts, or where the motives of the party enter into the question, it has been said that the whole must necessarily be submitted to a jury. Hill *v.* Hobart, 16 Maine, 164; Greene *v.* Dingley, 24 Maine, 131. See also Cocker *v.* Franklin Man. Co. 3 Sumner, 530, and Ellis *v.* Thompson, 3 M. & W. 445, for instances of reasonable time decided by the Jury. In Howe *v.* Huntington, 15 Maine, 350, *Shepley*, J., enumerates several cases where this question is for the jury. And see *ante*, p. 47, n. (*x*).

(*h*) Russell *v.* Ormsbee, 10 Vermont, 274. And see Bailey *v.* Simonds, 6 N. H. 159.

obligation. (*i*) And if the time be fixed by reference to a future event, the promisor has a right to all the time requisite for the happening of that event in the fullest and most perfect manner. (*j*)

Whether in computing time, the day when the contract is made shall be included or excluded, has been much disputed. It has been thought that this might be made to depend on the very words, as that "in ten days" includes the day of the making, and "in ten days from the day of the date" excludes it, while "ten days from the date" is uncertain. The later cases, however, seem to establish the principle that a computation of this kind shall always conform to the intention of the parties, so far as that can be ascertained from the contract, aided by admissible evidence. (*k*) If, however,

(*i*) Clark *v.* Remington, 11 Metc. 361; Craft *v.* Isham, 13 Conn. 28; Thomas *v.* Davis, 14 Pick. 353; Talbot *v.* Gray, 18 Pick. 534.

(*j*) Howe *v.* Huntington, 15 Maine, 350.

(*k*) Pugh *v.* Leeds, Cowp. 714, is the leading case upon this point. There, one Godolphin Edwards under a power reserved in his marriage settlement to lease for 21 years in *possession, but not in reversion*, granted a lease to his only daughter for 21 years, to commence *from the day of the date*; and the question was whether this was a lease in possession or in reversion. The court *held* that the word "from" may mean either *inclusive* or *exclusive*, according to the context and subject-matter; and should be so construed as to effectuate the deeds of parties and not destroy them; and therefore that in this case it should be construed as *inclusive*. Lord *Mansfield*, in delivering the judgment of the court said, "The question is, 'whether this be a lease *in possession?*' And it turns upon this: 'Whether to commence *from* the *day* of the *date* in this deed, is to be construed *inclusive*, or *exclusive* of the day it bears date?' I will first consider it as supposing this a *new* question, and that there never had existed any litigation concerning it. In that light, the whole will turn upon a point of construction of the particle '*from*.' The power requires no precise form to describe the commencement of the lease; the law requires no *technical* form. All that is required, is only enough to show that it is a lease in possession, and not in reversion; and therefore if the words used are sufficient for that purpose, the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word '*from*' must always *depend* upon the *context* and *subject-matter*, whether it shall be construed *inclusive* or *exclusive* of the *terminus à quo;* and whilst the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive,' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date *inclusive*,' the term would have commenced immediately; if they had said, 'from the day of the date *exclusive*,' it would have commenced the next day. But let us see whether the context and subject-matter in this case do not show that the construction here should be *inclusive*, as demonstrably as if the word 'inclusive' had been added. This is a lease made under a power; the lease refers to the power, and the power requires that the lease should be a lease in *possession*. The validity of it depends upon its being in possession; and it is made as a provision for an only daughter. He must therefore *intend* to make a *good*

there is nothing in the language or subject-matter of the contract which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made. (*l*)

lease. The expression then, compared with the circumstances, is as strong in respect of what his intention was, as if he had said in express words, 'I mean it as a lease in possession.' 'I mean it shall be so construed.' If it is so construed, the word '*from*' must be *inclusive*. This construction is to support the deed of parties, to give effect to their intention, and to protect property. The other is a subtlety to overturn property, and to defeat the intention of parties, without answering any one good end or purpose whatsoever. And though courts of justice are sometimes obliged to decide against the convenience, and even against the seeming right of *private* persons, yet it is always in favor of some great *public* benefit. But here, to construe 'from the day of the date' to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument." His lordship then proceeded to a minute examination of the cases in their chronological order; and concluded that they were "*yes* and *no*, and a *medium* between them," and stood little in the way, "as *binding* authorities, against justice, reason, and common sense." So in Lester *v.* Garland, 15 Vesey, 248, it was said to depend upon the reason of the thing, according to circumstances, whether the day should be included or excluded.

(*l*) Bigelow *v.* Willson, 1 Pick. 485. In this case it was held that in computing the time allowed by St. 1815, c. 137, § 1, for redeeming a right in equity, sold on execution, which is "within one year from the time of executing, by the officer to the purchaser, the deed thereof," the day on which the deed is executed is to be excluded. And *Wild*, J., in delivering the opinion of the court, said, "Before the case of Pugh *v.* The Duke of Leeds, all the cases agree that the words, 'from the day of the date,' are words of exclusion. So plain was this meaning thought to be, that leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine, thus applied, Lord *Mansfield* very justly complains, not, however on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties to the contract had been disregarded. All that was decided in that case was, that 'from the day of the date' might include the day, if such was the clear intention of the contracting parties; and not that such was the usual signification of the words. I think, therefore, we are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation; and that this rule of construction is never to be rejected, unless it appears that a different computation was intended. So also if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after any given day, until that day is expired." See also Pellew *v.* Wonford, 9 B. & C. 134, where the clause "two days *after*" a certain day was held to exclude that day. A sensible criterion seems to be to reduce the time to one day, and see whether you do not obtain an absurdity, unless you exclude the first day; and you must have the same rule whatever be the number of days. This was the rule adopted in Webb *v.* Fairmaner, 3 M. & W. 473, where goods were sold on the 5th of October to be paid *for in two months*. It was held that no suit could be sustained until after the expiration of the 5th of December following. And see to the same effect Bigelow *v.* Willson, *supra;* Hardy *v.* Ryle, 9 B. & C. 603. Rex *v.* Adderley, 2 Dough. 463, was decided on a particular ground, under a statute in favor of sheriffs, and cannot be considered as laying down any general rule. It is true that in Glass-

And, generally, where the party whose interests the computation affects, is not the one who may determine when the event shall happen, the longest time is given him, and therefore the day of the making is excluded. (*m*) If the contract refers to "the day of the date," or "the date," and expresses any date, this day, and not that of the actual making, is taken. But if there is in the contract no date, or an impossible date — as if a thing is required to be done within "ten days from the date," and the contract was not made until twenty days from the expressed date, then the day of the actual making will be understood to be meant by the day of the date. (*n*) The expression "between two days" excludes both. (*o*)

ington *v.* Rawlins, 3 East, 407, the first day seems to have been included, but there the party lay in prison on the day he went there, and also a *portion* of each of the twenty-eight days necessary under the statute to amount to an act of bankruptcy, and as the law takes no cognizance of a part of a day, the case does not upon careful examination conflict with the rule in the text, viz., to regard the first day as excluded. Rex *v.* Cumberland, 4 Nev. & Mann. 378, is to the same effect. See Wilkinson *v.* Gaston, 9 Q. B. 141; Gorst *v.* Lowndes, 11 Sim. 434; Farwell *v.* Rogers, 4 Cushing, 460; Judd *v.* Fulton, 10 Barbour, 117; Bissell *v.* Bissell, 11 Id. 96; Thomas *v.* Afflick, 16 Penn. St. 14, overruling Goswiler's Estate, 3 Penn. 210; 4 Kent's Com. p. 95, n. (*a*); Blake *v.* Crowninshield, 9 N. H. 314; Ewing *v.* Bailey, 4 Scammor, 420; Presbrey *v.* Williams, 15 Mass. 193; Weeks *v.* Hull, 19 Conn. 376; Sands *v.* Lyon, 18 Conn. 28; Avery *v.* Stewart, 2 Conn. 69; Wiggin *v.* Peters, 1 Metc. 127; Cornell *v.* Moulton, 3 Denio, 12.

(*m*) Lester *v.* Garland, 15 Ves. 248, 256; Pellew *v.* Wonford, 9 B. & C. 134, 144, per Lord *Tenterden*. So the phrase "until a certain day" has been held to exclude that day. Wicker *v.* Norris, Cas. temp. Hardw. 116. But it may admit of a different interpretation according to the subject-matter and context. Rex *v.* Stevens, 5 East. 244.

(*n*) Styles *v.* Wardle, 4 B. & C. 908. This was an action of covenant on an indenture, dated the 24th December, 1822, whereby the plaintiff, in consideration of 924*l.*, leased to the defendant a house and premises for ninety-seven years; subject to an agreement for an under-lease to A. for twenty-one years; and the defendant covenanted that he would, within twenty-four calendar months then next after the date of the indenture, procure A. to accept a lease of the premises for the term of twenty-one years from *Christmas day*, 1821; and that in case A. would not accept the lease, that he, the defendant would, within one calendar month next after the expiration of the said twenty-four calendar months, pay to the plaintiff a certain sum of money. The declaration, after setting forth the indenture as above, assigned as a breach that the defendant did not procure A. to accept of said lease within said twenty-four calendar months, nor pay the said sum of money within one calendar month after the expiration of said twenty-four calendar months. The defendant pleaded that the indenture was not in fact executed and delivered until the 8th of April, 1823; and that at the time of the commencement of the action, twenty-five calendar months had not elapsed from the time of the execution of the indenture. To this plea the plaintiff demurred, and the court sustained the demurrer. *Bayley*, J., said:— "The question in this case is simply as to the construction to be put upon the words of this deed. A deed has no operation until delivery, and there may be cases in which *ut res valeat*, it is necessary to construe date, delivery. When there is no date, or an impossible date, that word must mean delivery. But

The rule which makes notes which become due on Sunday, without grace, payable on the Monday following, ap-

where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery. This distinction is noticed in Co. Litt. 46 *b*, where it is said, 'If a lease be made by indenture bearing date 26th of May, to hold, &c., for twenty-one years from the date, or from the day of the date, it shall begin on the 27th day of May. If the lease bears date the 26th of May, to have, &c., from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, &c.' And afterwards it is said 'If an indenture of lease bear date which is void or impossible, as the 30th of February, &c., if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all.' In Arnitt *v.* Bream, 2 Ld. Raym. 1082, it is said, 'If the award had no date, it must be computed from the delivery, and that is one sense of *datus*.' The question here is, what in this covenant is the meaning of *datus*? I consider that a party executing a deed agrees that the day therein mentioned shall be the date for purposes of computation. It would be very dangerous to allow a different construction of the word *date*, for then if a lease were executed on the 30th of March, to hold from the date, that being the 25th, and the tenant were to enter and hold as if from that day, yet, after the expiration of the lease, he might defeat an ejectment on the ground that the lease was executed on a day subsequent to the 25th of March, and that he did not hold from that day. All the authorities give a definite meaning to the word date in general, but show that it may have a different meaning when that is necessary, *ut res valeat*. It has been said that the computation could not have been intended to be made from the date, if the twenty-four months had elapsed before the execution of the deed. That may be true, for then the intention of the parties that the computation should not be made from the date would have been apparent. Here the meaning of the deed is plain, and according to that a breach of covenant was committed before the commencement of the action. The plea is therefore bad."

(*o*) Therefore, a policy of insurance on goods to be shipped between "February 1st and July 15th" does not cover goods shipped on the 15th of July. Atkins *v.* Boylston Fire and Marine Ins. Co., 5 Met. 439. In this case *Wild*, J., said: — "The construction of the policy seems to depend wholly on the true meaning of the word 'between.' This preposition, like many other words, has various meanings; and the question is, in what sense was it used in the present policy. The most common use of the word is to denote an intermediate space of time or place, and the defendant's counsel contends that it was so used in the present policy, and that the first day of February and the fifteenth day of July are to be both excluded. On the other hand, the plaintiff's counsel insists that both days are to be included; at least I so understood the argument. And we think it clear that both days must be included or excluded; for there is nothing in the contract manifesting the intention of the parties to include or exclude one day rather than the other. It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place, as the plaintiff's counsel remarked. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties, but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued that the word 'between' is not always used as exclusive of the *termini*, when it refers to locality. Thus we speak of a road between one town and another, although the road extends from the centre of one town to the other, and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings, or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land or the two buildings, would pass by the grant.

plies to all contracts; no one is bound to do any work in performance of his contract on Sunday, (*p*) unless the work by its very nature, or by express agreement, is to be done on that day, and can be done, without a breach of the law. But if a contract is to be performed, or some act done in a certain number of days, and Sunday happens to come between the first and last day, it must be counted as one day, unless the contrary be clearly expressed. (*q*) If a party, bound to do a thing on a certain day, and therefore having the whole intermediate time, by some act distinctly incapacitates himself from doing that thing on that day, it seems that an action may be commenced at once without waiting for that day. As if a man promises to marry a woman on a future day, and before that time marries another, he has been held liable to an action before the day of performance arrives. (*r*) So if he engages to lease or sell property from and after a certain day, but before that time conveys to another. (*s*) It might, however, seem more reasonable to permit such an action only where the capacity of the promisor could not be restored before the day, or the promisee had received a present injury from the act of the promisor. (*t*)

And we think the word 'between' has the same meaning when it refers to a period of time from one day, month or year, to another. If this policy had insured the plaintiff's property to be shipped between February and the next July it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded."

(*p*) Sands *v.* Lyon, 18 Conn. 18; Avery *v.* Stewart, 2 Conn. 69; Cock *v.* Bunn, 6 Johns. 326, and note (*a*) in 2nd edition; Salter *v.* Burt, 20 Wend. 205; Barrett *v.* Allen, 10 Ohio, 426; Link *v.* Clemmens, 7 Blackf. 479. But see *contra*, Kilgour *v.* Miles, 6 Gill. & Johns. 268; and see Stead *v.* Dawber, 10 Ad. & El. 57.

(*q*) Brown *v.* Johnson, 10 M. & W. 331; King *v.* Dowdall, 2 Sandf. 131.

(*r*) Short *v.* Stone, 8 Q. B. 358.

(*s*) Lovelock *v.* Franklyn, 8 Q. B. 371; Ford *v.* Tiley, 6 B. & C. 325; Bowdell *v.* Parsons, 10 East, 359.

(*t*) See New Eng. Mutual F. Ins. Co. *v.* Butler, 34 Maine, 451. But the recent case of Hochster *v.* DeLatour, 20 Eng. Law. & Eq. 157, goes further in sustaining such an action than any previous case. The action was commenced on the 22d of May, 1852. The declaration stated that in consideration that the plaintiff would agree to enter the service of the defendant as a courier, on the 1st of June, 1852, and to serve the defendant in that capacity, and travel with him as a courier, for three months certain, from the said 1st of June, for certain monthly wages, the defendant agreed to employ the plaintiff as courier on and from the said 1st of June for three months certain, to travel with him on the continent, and to start with the plaintiff on such travels on the said day, and to pay the plaintiff during such employment the said monthly wages. Averment of an agreement to the said terms on the part of the plaintiff, and of his readiness and willingness to enter upon the said employment, and to perform the said agreement. Breach, that the defendant, before the said 1st of June, wholly refused

6. *Of notice.*

Contracts sometimes express that they are to be performed "on notice" generally, or on some specific notice, and notice

to employ the plaintiff in the capacity and for the purpose aforesaid, on or from the said 1st day of June or any other time, and wholly discharged the plaintiff from his said agreement, and from the performance of the same, and from being ready and willing to perform the same; and the defendant wholly broke and put an end to his promise and engagement: — *Held*, in arrest of judgment, that, after the refusal of the defendant to employ, the plaintiff was entitled to bring an action immediately, and was not bound to wait until after the day agreed upon for the commencement of performance had arrived. And Lord *Campbell*, in delivering the judgment of the court, said, "On this motion in arrest of judgment the question arises whether, if there be an agreement between A. and B., whereby B. engages to employ A., on and from a future day, for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement, and break and renounce it, so as to entitle A. before the day, to commence an action against B. to recover damages for breach of the agreement; A. having been ready and willing to perform it until it was broken and renounced by B. The defendant's counsel very powerfully contended that if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. Short *v.* Stone, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. Ford *v.* Tiley, 6 B. & C. 325. So if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. Bowdell *v.* Parsons, 10 East, 359. One reason alleged in support of such an action is, that the defendant has before the day, rendered it impossible for him to perform the contract at the day. But this does not necessarily follow, for prior to the day fixed for doing the act, the first wife may have died; a surrender of the lease executed might be obtained; and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that when there is a contract to do an act on a future day, there is a relation constituted between the parties in the mean time by the contract, and that they impliedly promise that in the mean time neither will do anything to the prejudice of the other, inconsistent with that relation. As an example: a man and woman, engaged to marry, are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber, in Emmens *v.* Elderton, 6 C. B. 160, which we have followed in subsequent cases in this court. The declaration in the

is then indispensable. (*u*) In some instances the necessity of notice springs from the nature of the contract, though nothing be said about it. Generally, where any thing is to be

present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract, unless he treats the contract as in force, and acts upon it down to the first of June, 1852, it follows that till then he must enter into no employment which will interfere with his promise "to start on such travels with the plaintiff on that day," and that he must then be properly equipped in all respects as a courier for three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the first of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage to Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe, in the months of June, July, and August, 1852, according to decided cases the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged, from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

(*u*) Hodsden *v.* Harridge, 2 Wms. Saund. 62, a., n. (4); Child *v.* Horden, 5 Bulstr. 144. In Quarles *v.* George, 23 Pick. 400, by a contract between the plaintiff and the defendant it was agreed that the defendant should deliver to the plaintiff one thousand barrels of flour, at the rate of six dollars per barrel, at any time within six months from the date of the contract, and give him six days notice prior to the time of such delivery, and that the plaintiff should pay that price therefor on delivery. In an action by the plaintiff against the defendant for not delivering the flour within the six months, it was *held*, that under the provisions of this contract it was incumbent on the defendant to do the first act by giving notice of his readiness to deliver the flour; but that as he had a right to give notice six days before the expiration of the six months, and had he then given notice he would

done by one party on the performance of some act by the other, this other must give notice of such act, (*v*) unless it

have had till the last day of the six months to deliver the flour, the actual breach of the contract by non-delivery must be taken to have occurred on such last day, and the damage computed accordingly.—In declaring on a promise to pay money on demand, if a third person shall fail to do a certain act, it is not necessary to aver a notice of the failure to do that act, or a demand of the money. Dyer *v.* Rich, 1 Mete. 189.

(*v*) Vyse *v.* Wakefield, 6 M. & W. 442, 8 Dowl. P. C. 377, 4 Jur. 509, affirmed on error, 7 M. & W. 126, is an excellent case on this subject. There the declaration stated, that, by indenture, the defendant covenanted that he would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void:—Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—*Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected. Lord *Abinger* said:—"I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality, to ascertain whether such a policy had been effected, he would still be obliged to do something more; namely, to learn what were the particular conditions on which it was effected, because the covenant here is, not that the defendant shall not do any thing to evade the covenants or conditions usually prescribed by insurance offices; but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced; i. e., he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from the conditions in general use, might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them, to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the

be one that carries notice of itself. And if the thing is to be

matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle it is quite time that they should be overruled." And *Parke*, B., said: — "The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand performance is to arise is perfectly indefinite, as in the case of Haule *v.* Hemyng, Vin. Abr. 'Condition,' (A. d.) pl. 15, Cro. Jac. 422, where the defendant promised to pay the plaintiff for certain weys of barley as much as the plaintiff sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and, in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone, (for there are some cases to that effect,) or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at *some office* in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to all actually existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice; and I think therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, *perhaps*, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected." See also Haule *v.* Hemyng, Vin. Abr. Condition, (A. d.) pl. 15; S. C. nom. Henning's case, Cro. Jac. 432. So in Graddon *v.* Price, 2 C. & P. 610, it was held that a performer, who is called on to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputation at stake. In Haverly *v.* Leighton, 1 Bulstr. 12, the defendant promised the plaintiff's intestate that if he borrowed £100 of B. he would pay him the same sum, upon the same conditions, as they between them should agree upon, and notice of such agreement was held not necessary. So in Bradley *v.* Toder, Cro. Jac. 228, and Fletcher *v.* Pynsett, Cro. Jac. 102, where the promise was in consideration that the plaintiff would marry such a woman, the defendant would give him £100, notice of the marriage was held not necessary.

done on the happening of an event not to be caused by either party, he who is to have the benefit of the thing should give notice to him who is to do it, that the event has occurred, unless from its own nature, it must become known to that party when it happens; or, perhaps, unless it is as likely to be known to the party who is to do the act required by the contract, as to him for whose benefit it is to be done. The rule in respect to demand rests upon the same principle with that in respect to notice. It may be requisite, either from the stipulations of the parties, or from the peculiar nature of the contract; but where not so requisite, he who has promised to do any thing, must perform his promise in the prescribed time and the prescribed way; or if none be prescribed, in a reasonable time and a reasonable way, without waiting to be called upon.

8. *Of impossibility of performance.*

It has been somewhat questioned how far the impossibility of doing what a contract requires, is a good defence against an action for the breach of it. If the performance of a contract becomes impossible by the act of God, that is, by a cause which could not possibly be attributed to the promisor, and this impossibility was not among the probable contingencies which a prudent man should have foreseen and provided for, it should seem that this would be a sufficient defence. (*w*) But to make the act of God a defence, it must amount to an impossibility of performance by the promisor; mere hardship or difficulty will not suffice. (*x*) So the non-

(*w*) Williams *v.* Lloyd, W. Jones, 179; S. C. nom. Williams *v.* Hide, Palmer, 548. In this case the declaration stated that the plaintiff delivered a horse to the defendant, which the defendant promised to redeliver upon request; and that although he was requested to redeliver the horse, he refused. The defendant pleaded that the horse was taken sick, and died, and that the plaintiff made the request after the horse was dead. To this plea the plaintiff demurred, and judgment was given for the defendant.

(*x*) Thus in Bullock *v.* Dommitt, 6 T. R. 650, it was held that a lessee of a house who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire. And Lord *Kenyon* said, "The cases cited on behalf of the plaintiff have always been considered and acted upon as law. In the year 1754 a great fire broke out in Lincoln's Inn, and consumed many of

performance of a contract is not excused by the act of God, where it may still be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible. (*y*)

If one for a valid consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. So if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they

the chambers, and among the rest those rented by Mr. Wilbraham, and he, after taking the opinions of his professional friends, found it necessary to rebuild them. On a general covenant like the present, there is no doubt but that the lessee is bound to rebuild in case of an accidental fire; the common opinion of mankind confirms this, for in many cases an exception of accidents by fire is cautiously introduced into the lease to protect the lessee." So in Brecknock Co. *v.* Pritchard, 6 T. R. 750, it was held that on a covenant to build a bridge in a substantial manner and to keep it in repair for a certain time, the party is bound to rebuild the bridge though broken down by an unusual and extraordinary flood. So in Atkinson *v.* Ritchie, 10 East, 530, the master and the freighter of a vessel of 400 tons having mutually agreed in writing, that, the ship being fitted for the voyage, should proceed to St. Petersburg and there load from the freighter's factor a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, &c.; it was *held* that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo, though the jury found that he acted *bonâ fide* and under a reasonable and well-grounded apprehension at the time, and a hostile embargo and seizure was in fact laid on six weeks afterwards. And the cases from 6 T. R. above cited were approved. So in Gilpins *v.* Consequa, 1 Peters, C. C. 86, it was held that it is no excuse for the non-performance of a contract to deliver "prime," "first chop" teas, that the season of the year when the teas were to have been delivered, was unfavorable to the best teas being in market. Again, in the leading case of Paradine *v.* Jane, Aleyn, 26, where to an action of debt for rent, the defendant pleaded that a certain German Prince, by name Prince Rupert, an alien born, an enemy to the king and kingdom, had invaded the realm with a hostile army, and with the same force had entered upon the defendant's possession, and him expelled and held out of possession, whereby he could not take the profits; upon demurrer the plea was held bad. And this difference was taken, "that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." See also Huling *v.* Craig, Addison, 342.

(*y*) White *v.* Mann, 26 Maine, 361; Chapman *v.* Dalton, Plowden, 284; Holtham *v.* Ryland, 1 Eq. Cas. Abr. 18.

might have been prevented, the promisor should be held answerable. So if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse. (*z*) But if one promises to do what cannot be done, and the impossibility is not only certain but perfectly obvious to the promisee, as if the promise were to build a common dwelling-house in one day, such a contract must be void for its inherent absurdity. (*a*)

That the illegality of a contract is in general a perfect defence, must be too obvious to need illustration. It may indeed be regarded as an impossibility by act of law; and it is put on the same footing as an impossibility by act of God; because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do that which it forbids his doing.

Therefore if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise; and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do it, this act also avoids the agreement. (*b*) But if one agrees to do what is at the time unlawful, a subsequent act making the act lawful, cannot give validity to the agreement, because it was void at its be-

(*z*) See *ante*, vol. 1, p. 384, n. (*c*). And see Pothier, Traité des Obligations, Pt. 1, ch. 1, sect. 4, § 2.

(*a*) Thus, in Faulkner *v.* Lowe, 2 Exch. 597, there was a covenant by C. to pay a sum of money to A., B., and to himself, C., or the survivors or survivor of them on their joint account. C. being sued upon this covenant, the court held the covenant senseless and impossible, and judgment was given for the defendant.

(*b*) Presb. Church *v.* City of N. York, 5 Cowen, 538. In that case the corporation of the city of New York conveyed lands for the purposes of a church and cemetery, with a covenant for a quiet enjoyment, and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery; *Held*, that this was not a breach of the covenant which entitled to damages, but it was a repeal of the covenant. And *Savage*, C. J., thus remarked upon the authorities: "There are but few authorities on this question, and those few are at variance. The case of Brason *v.* Dean, 3 Mod. 39, decided in 1683, was covenant upon a charter-party for the freight of a ship. The defendant pleaded that the ship was loaded with French goods prohibited by law to be imported. And upon demurrer judgment was given for the plaintiff, for the court were all of opinion that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant was binding. But in the case of Brewster *v.* Kitchin, 1 Ld. Raym. 317, 321, A. D. 1698, a different and a more rational doctrine is established. It is there said, 'For the difference

ginning. A law may, however, have the effect of suspending an agreement that was originally valid, and which it makes impossible without violation of law; and yet leave the contract so far subsisting that upon a repeal of the law the force and obligation of the contract remains. (*c*) It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract.

SECTION IV.

OF DEFENCES RESTING UPON THE ACTS OR OMISSIONS OF THE PLAINTIFF.

It is a good defence to an action on a contract, that the obligation to perform the act required, was dependent upon some other thing which the other party was to do, and has failed to do. And if before the one party has done any thing, it is ascertained that the other party will not be able to do that which he has undertaken to do, this will be a sufficient

when an act of parliament will amount to a repeal of a covenant and when not, is this; when a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after and compels him to do it, then the act repeals the covenant; and *vice versâ*. But when a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant.' In 1 Salkeld, 198, where the same case is reported, the proposition is thus stated; 'Where H. covenents not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.'"

(*c*) Thus in Baylies *v.* Fettyplace, 7 Mass. 325, it was held that a law of the United States laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver debentures, but operated as a suspension only during the continuance of the law. So in Hadley *v.* Clarke, 8 T. R. 259, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arrival at Falmouth in the course of her voyage, an embargo was laid on her "until the further order of council;" it was *held* that such embargo only suspended the execution, but did not dissolve the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

reason why the first party should do nothing. (*d*) And this excuse is valid, although the omission by the other party to do the thing required of him, was prevented by causes which he could neither foresee nor control. And even if it is provided that the thing shall be done "unless prevented by unavoidable accident," the accident to excuse the not doing, must be not only unavoidable, but must render the act physically impossible, and not merely unprofitable and inexpedient by reason of an increase of labor and cost. (*e*)

If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; (*f*) but if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party. In all cases whatever, a promisor will be discharged from all liability when the non-performance of his obligation is caused by the act, or the fault, of the other contracting party. (*g*)

(*d*) Caines *v.* Smith, 15 M. & W. 188, where defendant had promised to marry plaintiff, but married another woman.—To an action for breach of promise, a plea by defendant that he had never been requested by the plaintiff to perform his contract was held ill. Johnston *v.* Caulkins, 1 Johns. Cas. 116, where in a similar action it was held that if the defendant has *absconded*, the plaintiff need not show an offer to marry him. And see other instances of the same principle in Short *v.* Stone, 8 Q. B. Rep. 358; Lovelock *v.* Franklyn, Id. 371; Ford *v.* Tiley, 6 B. & C. 325; Bowdell *v.* Parsons, 10 East, 359.

(*e*) See *ante*, p. 184, n. (*x*.)

(*f*) Phillpots *v.* Evans. 5 M. & W. 477; Ripley *v.* McClure, 4 Exch. R. 345; Leigh *v.* Paterson, 2 J. B. Moore, 588. This principle, however, is drawn in question by the recent case of Hochster *v.* De Latour, 20 Eng. Law & Eq. 157, where it was held that if A. engages to employ B. in his service, the term to commence at a future day, and before that day A. changes his mind and refuses to employ him, this is a breach of the contract, and B. may have his action for such breach *immediately*, and is not bound to wait until the day the service was to commence. A. in such case has no right to a *locus panitentiæ*. See the case fully stated, *ante*, p. 179, n. (*t*). So it was held in Cort *v.* Ambergate, &c. Railway Co. 6 Eng. Law & Eq. R. 230, that where there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract.

(*g*) Thus, where one was bound to deliver a deed on a day certain, and at the day was ready with the deed, and would have tendered it but for the evasion of the other party, this was held to be equivalent to a tender. Borden *v.* Borden, 5 Mass. 67. And see Com. Dig. Condition, L. (6); Goodwin *v.* Holbrook, 4 Wend. 377; Whitney *v.* Spencer, 4 Cow. 39; People *v.* Bartlett, 3 Hill, 570.

The validity of many of these defences, resting upon the act or default of the other party, must depend upon the question, which is sometimes difficult, whether the contracts are in fact dependent, or independent. There are cases, and especially some early ones, which seem to be severe, and more technical than rational; but of late the courts incline to decide these questions as good sense and common justice require. But there are rules by which they are guided in this matter, if not controlled; and we would add to what we have already said on this subject, that the classes of engagements contained in one contract — dependent, concurrent, and independent — may be thus distinguished. Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of this thing is a condition precedent to the payment; and if the money is to be paid in instalments, some before a thing is to be done, and some when it is done, the doing of the thing is not a condition precedent to the former payments, but is to the latter. And if there is a day for the payment of the money, and this comes before the day fixed for the doing of the thing, or before the time when the thing, from its nature, can be performed, then the payment is at all events obligatory, and an action may be brought for it independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous, and either party may sue the other for a breach of the contract, on showing, *either*, that he was able, ready, and willing to do his act at the proper time and in the proper way, *or* that he was prevented from doing it, or being so ready to do it, by the act or default of the other contracting party. (*h*)

The defendant may rely on the fact that the contract has been rescinded; and this may have been done by mutual consent, or by the plaintiff, who had the right to do so, or by

(*h*) See this subject considered and the authorities cited, *ante*, p. 86, *et seq.*

the defendant, if he had the right. (*i*) Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded only by the consent of all. (*j*) But this consent need not be expressed as an agreement. (*k*) If either party, without right, claims to rescind the contract, the other party need not object, and if he permit it to be rescind-

(*i*) But where a party has a right to rescind a contract, and no specified time is allowed, he must rescind within a seasonable time. Hodgson *v.* Davies, 2 Campb. 530; Okell *v.* Smith, 1 Starkie, 107; Prosser *v.* Hooper, 1 Moore, 106. Which is a question of law for the court, and not of fact for the jury. Kingsley *v.* Wallis, 14 Maine, 57; Holbrook *v.* Burt, 22 Pick. 546. One party may have a right to rescind a contract, which may yet be binding upon the other, and although the contract was, in a certain event, by its terms to be "null and void." Thus, where by stat. 17 Geo. 3, c. 50, § 8, the vendor at an auction was impowered to make it a condition of sale that the purchaser should pay the auction-duty in addition to the purchase-money, and it was declared that upon his neglect or refusal to pay the same, the bidding "should be null and void to all intents and purposes;" it was held that the contract is not by reason of such neglect or refusal absolutely *void*, but *voidable* only, at the option of the vendor. Malins *v.* Freeman, 6 Scott, 187.

(*j*) Whether there has been a rescission of the contract is a question for the jury. See Fitt *v.* Cassanet, 4 M. & G. 898.

(*k*) The rescission by one party may be as strongly expressed by acts as by words. Thus in Goodrich *v.* Lafflin, 1 Pick. 57, A. agreed to deliver to B. some step stones which were to be paid for one half in money and one half in goods. The stones were delivered, and B. delivered some of the goods upon the special contract. B. having sued A. and recovered judgment for the value of the goods delivered, declaring upon the common counts only, it was held that A. might, *upon the common counts only*, recover the value of the stones. So in Hill *v.* Green, 4 Pick. 114, by a contract under seal the plaintiff agreed that his son, a minor, should work for the defendant nine months, and the defendant agreed to give him therefor certain chattels, which were delivered forthwith, but were to remain the property of the defendant until the service should be performed. The plaintiff sold the chattels to a stranger, and the boy was afterwards wrongfully turned away by the defendant before the expiration of the term. The defendant reclaimed the chattels, and the vendee, knowing all the facts, settled the demand by paying him a sum of money. *Held*, that the written contract was rescinded and that the plaintiff was entitled to recover on a *quantum meruit* for the service performed, but that neither the plaintiff nor his vendee could recover back the money paid to the defendant. In Quincy *v.* Tilton, 5 Greenl. 277, it was held that where parties agree to rescind a sale once made and perfected without fraud, the same formalities of delivery, &c., are necessary to revest the property in the original vendor which were necessary to pass it from him to the vendee. In James *v.* Cotton, 7 Bing. 266, the plaintiff engaged to let land to the defendant on building leases, and to lend him £6,000 to assist him in the erection of 20 houses on the land. Defendant agreed to build the houses, and convey them as security for the loan, which was to be paid at a time fixed. When 6 houses had been built, and part of the £6,000 had been advanced, plaintiff requested defendant not to go on with the other 14 houses. Defendant desisted. *Held*, that this amounted to a rescission of the contract by mutual consent, and the plaintiff was allowed to recover the amount advanced on a count for money lent.—If by the terms of the contract it is left in the power of the plaintiff to rescind by any act of his, and he does it, or if the defendant afterwards consents to its being rescinded, the plaintiff may treat the contract as rescinded. Towers *v.* Barrett, 1 T. R. 133.

ed, it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party, in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind; (*l*) and generally where one fails to perform his part of the contract, or disables himself from performing it, (*m*) the other party may treat the contract as rescinded. (*n*) But not if he has been guilty of a default in his engagement, for he cannot take advantage of his own wrong to defeat the contract. Nor if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed. (*nn*) Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the con-

(*l*) See preceding note.

(*m*) Thus in Keys *v.* Harwood, 2 Com. B. 905, A. agreed to board B. and to receive pay in certain goods. Before the time of payment arrived, B. allowed those goods to be seized and sold on execution against him. This was held a rescission of the contract, and A. was allowed to recover on a general count, and without reference to the special contract. So in Planchè *v.* Colburn, 8 Bingham, 14, where A. agreed to write a treatise for a periodical publication, which, before the treatise was completed, the defendant discontinued, this was considered an abandonment of the contract by the defendant, and the plaintiff was allowed to recover on a *quantum meruit*, without completing the treatise. See Shaw *v.* The Turnpike Co. 2 Penn. 454, 3 id. 445. In Dubois *v.* Delaware Canal Co. 4 Wend. 285, *Marcy*, J., said:—"Every breach of a special agreement by one party does not authorize the other to treat it as rescinded; but there are some breaches that do amount to an abandonment of it. There is not, perhaps, any precise rule, which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not; but if the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of his agreement, the contract may, I think, be considered as rescinded."

(*n*) But this is not always the case. Thus in Weaver *v.* Sessions, 6 Taunton, 154, the plaintiff covenanted to furnish the defendant all the malt he should want for a certain specified period, which should be "good, well dried and marketable." The defendant covenanted to buy all his malt of the the plaintiff, and not to buy elsewhere, unless the plaintiff neglected or refused to deliver him good malt *on request*. The plaintiff having delivered bad malt, the defendant bought of others, without having first requested the plaintiff to furnish better. The court held that the non-compliance by the plaintiff, merely in delivering bad malt for good, did not authorize a rescission of the contract, and that the defendant was liable for purchasing of others, before the plaintiff had *refused* or *neglected* on *request* to furnish better.

(*nn*) In Franklin *v.* Miller, 4 Ad. & Ell. 599, *Littledale*, J., says, "It is a clearly recognized principle that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." See *ante*, p. 43, n.

tract was made. (*o*) If, therefore, one of the parties has derived an advantage from a partial performance, he cannot hold

(*o*) Hunt *v.* Silk, 5 East, 449, the leading case upon this point. There A. agreed, in consideration of £10, to let a house to B., which A. was to repair and execute a lease of *within ten days*, but B. was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart and pay the rent. B. took possession and paid £10 immediately, but A. neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which B. still continued in possession: *Held* that B. could not, by quitting the house *for the default of* A., rescind the contract and recover back the £10 in an action for money had and received, but could only declare for a breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract; and here B. had had an intermediate possession of the premises under the agreement. And Lord *Ellenborough* said: — "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of: the parties cannot be put *in statu quo*." So in Boed *v.* Blandford, 2 Y. & Jer. 278, where the master and part-owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money and received the title deeds, which he deposited as a security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale, or refund the money; it was held that an action for money had and received would not lie to recover the purchase-money, as the parties could not be restored to their original situation. *Alexander*, C. B., said:—"In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into. The plaintiff has, by his intermediate occupation, derived the profits of the vessel; if he has not, he might have done so; and it is impossible to say what the defendant might have made had he, during the time, had any control over it. Under these circumstances, it cannot be said, that the situation of the parties has not been altered; and that, by the plaintiff's recovering in this action, their original position may be restored. Besides this, the defendant's title deeds have been deposited by the plaintiff as a security for the money advanced to him. How could the defendant, in this respect, be restored to his original situation by this action? He is at the mercy of the defendant for his title deeds, and cannot recover them by any process in this cause. I think the objection is unanswerable, and that the rule for a nonsuit must be made absolute." And *Vaughan*, B., said:—"The decision in Hunt *v.* Silk lays down a very clear and just rule in these cases: if the circumstances be such, that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract, and maintain his action for money had and received, to recover back what he may have paid upon the faith of it."—And where one party elects to rescind a contract for fraud, he must return the consideration received before any right of action accrues, and it is not enough to notify the party defrauding, and call upon him to come and receive the goods. Norton *v.* Young, 3 Greenl. 30. But in the case of Masson *v.* Bovet, 1 Denio, 69, it was said that though the general rule is, that the party who would rescind a contract on the ground of fraud, for the purpose of recovering what he has advanced upon it, must restore the other party to the condition in which he stood before the contract was made; yet, where the party who practised the fraud has entangled and complicated the subject of the contract in such a manner as to render it impossible that he should be restored to his former condition, the party

this and consider the contract as rescinded because of the non-performance of the residue ; (*p*) but must do all that the contract obliges him to do, and seek his remedy in damages. And if the thing to be done on the one side as the consideration of the agreement on the other side, is to be done at several times, a failure at one time will not generally authorize the other party to treat the whole contract as rescinded ; although, even in such continuing cases, this partial failure may perhaps be so destructive of the contract as to give the other party the right to consider it as wholly rescinded. (*q*)

SECTION V.

ACCORD AND SATISFACTION.

Another sufficient defence is accord and satisfaction ; which is substantially another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement. This is the meaning of the ancient rule, that accord without satisfaction is no bar to an action ; and it used to be laid down in the earlier books with great exactness, that the execution of the accord must be complete and perfect. (*r*) So, indeed, it must be now, except where the

injured, upon restoring, or offering to restore what he has received, and doing whatever is in his power to undo what has been done in the execution of the contract, may rescind it and recover what he has advanced. See further upon this point, per *Tindal*, C. J., in Fitt *v.* Cassanet, 4 M. & G. 903 ; Blackburn *v.* Smith, 2 Exch. R. 783 ; Junkins *v.* Simpson, 14 Maine, 364 ; Coolidge *v.* Brigham, 1 Metc. 547 ; Peters *v.* Gooch, 4 Blackf. 515 ; Turnpike Co. *v.* Commonwealth, 2 Watts, 433 ; Brown *v.* Witter, 10 Ohio, 142 ; Allen *v.* Edgerton, 3 Verm. 442 ; Luey *v.* Bundy, 9 N. H. R. 298 ; Stevens *v.* Cushing, 1 N. H. 17 ; Perley *v.* Balch, 23 Pick. 283.

(*p*) And if one party has derived all the intended benefit from a contract, the agreement to rescind the contract will not bar the plaintiff from some remedy. Thus to an action for goods sold and delivered, it is no defence that the goods were sold in pursuance of a special contract, which was afterwards rescinded and annulled by both parties. Edwards *v.* Chapman, 1 M. & W. 231, *Parke*, B., saying :—"A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction."

(*q*) See *supra*, n. (*n*).

(*r*) Cock *v.* Honychurch, T. Raym. 203, 2 Keble. 690. Trespass for an assault. Plea, a *concord* between the parties that the defendant should pay plaintiff £3, and his attorney's bill, and that he had paid the £3, and was ready to pay the attorney's bill, but he never showed him any. This was held no defence, because the accord was not *wholly* executed. See also Peytoe's case, 9 Rep. 79 b ; Anonymous, Cro. Eliz. 46 ; Case *v.* Barber, T. Raym. 450, T. Jones,

new promise itself is by the accord or agreement the satisfaction for the debt or broken contract. The party holding the claim may agree to take a new promise of the other in satisfaction of it; or he may agree to receive a new undertaking when the same shall be executed, as a satisfaction. In either case he will be held to his bargain, and only to that. (*s*) Whether the new promise shall have by itself the

158; Bree *v.* Sayler, 2 Keble. 332; Hall *v.* Seabright, 2 Keble, 534; Brown *v.* Wade, 2 Keble, 851; Frentress *v.* Markle, 2 Iowa R. 553; Coit *v.* Houston, 3 Johns. Cas. 243; Watkinson *v.* Inglesby, 5 Johns. 386; Frost *v.* Johnson, 8 Ohio, 393; Woodruff *v.* Dobbins, 7 Blackf. 582; Ballard *v.* Noaks, 2 Pike, 45; Brooklyn Bank *v.* De Grauw, 23 Wend. 342.

(*s*) Babcock *v.* Hawkins, 23 Verm. R. 561. This was an action of book account. It appeared that after the commencement of the suit, the parties met, and the defendant agreed to give a note for thirty dollars to the plaintiff, and pay all the plaintiff's costs in the suit, except the writ and service. The defendant executed the note and agreed to pay the costs, as above stated; and the plaintiff then executed and delivered to him a receipt in these words:—"Received of Peter Hawkins thirty dollars by note given *per* this date, in full to settle all book accounts up to this date;" and the suit, as well as the subject-matter of the suit, was considered as settled by the parties. The defendant never paid any portion of the costs, but paid part of the note; and for the reason that the defendant had not paid the costs the plaintiff refused to discontinue the suit. Upon these facts, found by an auditor, the county court rendered judgment for the defendant, which was affirmed by the supreme court. *Redfield*, J., in delivering the opinion of the court, said:—"We think it must be regarded as fully settled, that an agreement upon sufficient consideration, fully executed, so as to have operated in the minds of the parties, as a full satisfaction and settlement of a preëxisting contract or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law. 1. There is no want of consideration in any such case, where one contract is substituted for another, and especially so where the amount due upon the former contract or account is matter of dispute. The liquidating a disputed claim is always a sufficient consideration for a new promise. Holcomb *v.* Stimpson, 8 Vt. 151. 2. The accord is sufficiently executed, when all is done which the party agrees to accept in satisfaction of the preëxisting obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of former securities, by release or receipt in full, or in any other mode. All that is requisite is, that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the preëxisting liability, in the present tense. That is shown in the present case, by executing a receipt in full, the same as if the old contract had been upon note, or bill, and the papers had been surrendered. 3. In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. And in the present case, as it is obvious to us, that the plaintiffs agreed to accept the note, and the defendant's promise to pay the costs in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract. 4. In all cases where the party intends to retain his former remedy he will neither surrender or release it; and whether the party shall be permitted to sue upon his original con-

effect of satisfying the original claim must be determined by a construction of the new agreement. Generally, but not universally, if the new promise be founded upon a new consideration, and is clearly binding on the original promisor, this is a satisfaction of the former claim ; (*t*) and otherwise it is no satisfaction. (*u*) But even this last kind of promise, if it be fully performed, at the right time and in the right way, (and not merely tendered) may become then a satisfac-

tract is matter of intention always, unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract." So in Com. Dig. tit. Accord, (B. 4.) it is said that " an accord, *with mutual promises to perform*, is good ; though the thing be not performed at the time of the action, for the party has a remedy to compel the performance. Yet the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement." And in Sand *v.* Rhodes, 1 M. & W. 153, which was *assumpsit* by the indorsee against the acceptor of a bill of exchange for £43, the defendant pleaded that, after the bill became due, one G. P., the drawer of the bill, made his promissory note for £44, and delivered the same to the plaintiff in full satisfaction and discharge of the bill. Replication, that although he, the plaintiff accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid ;—*Held*, that the replication was bad, and that the plaintiff, having accepted the note in full satisfaction and discharge of the bill, could not sue upon the latter. *Held*, also, that the plea was sufficient. And see to the same effect Good *v.* Cheesman, 2 B. & Ad. 328 ; Evans *v.* Powis, 1 Exch. 601. But the rule established by these cases has made no material change in the form of the plea. It is still true that an accord without satisfaction is not good. Therefore if a defendant intends to set up a new promise without performance in bar of an action, he must take care to aver distinctly that it was agreed that the new promise should be received in satisfaction. If he sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction, and does not aver performance, the plea will of course be bad. This will explain several recent English cases, which might seem at first sight to be at variance with what is stated in the text. See Reeves *v.* Hearne, 1 M. & W. 323 ; Collingburne, *v.* Mantell, 5 M. & W. 289 ; Carter *v.* Wormald, 1 Exch. R. 81 ; Gifford *v.* Whittaker, 6 Q. B. Rep. 249 ; Griffiths *v.* Owen, 13 M. & W. 58 ; Harris *v.* Reynolds, 7 Q. B. 71 ; Bayley *v.* Homan, 3 Bing. N. C. 920 ; James *v.* David, 5 T. R. 140 ; Allies *v.* Probyn, 5 Tyrwh. 1079.

(*t*) Com. Dig. Accord, (B. 4) ; Good *v.* Cheesman, 2 B. & Ad. 228, per *Parke*, J. ; Cartwright *v.* Cooke, 3 B. & Ad. 701 ; Evans *v.* Powis, 1 Exch. R. 607 ; Bayley *v.* Homan, 3 Bing. N. C. 921 ; Wentworth *v.* Bullen, 9 B. & C. 850. In Pope *v.* Tunstall, 2 Pike, 209, it was *held* that in debt on a bond, a plea averring that before suit brought, the obligees in the bond had taken a third person into partnership, and that the defendant, with two securities, executed to the new partnership a bond on longer time, which was accepted and received in full satisfaction and discharge of the bond sued on, is good in bar as a plea of accord and satisfaction.

(*u*) Thus, a plea that the plaintiff accepted an order of the defendant on a third person for a given sum, in satisfaction of the promises, is no bar to an action for the original cause of indebtedness, nor is a plea good as an accord and satisfaction that the plaintiff agreed to accept the note of a third person, which, on being tendered, he refused to accept. Hawley *v.* Foote, 19 Wend. 516.

tion. (*v*) If the new promise is executory, and is not binding, it is no satisfaction until it be executed, and although it is to be performed on a future day certain, the promisee may have his original action before the new promise becomes due. (*w*) But if it be a binding promise, for a new consideration, performable at a future day certain, then the original right of action is suspended until that day comes; if the promise is then duly performed, this right is destroyed; but if the promise is not then duly performed this right revives, and the promisee has his election to sue on the original cause of action or on the new promise, unless by the terms or the legal effect of the new contract, the new promise is itself a satisfaction and an extinction of the old one. (*x*) This may be illustrated by the case of one who takes a promissory negotiable note, on time, for money which is due or to become due. This note is conclusive evidence of an agreement for delay or credit, and no action can be maintained on the original cause of action until the maturity of the note; (*y*) if then the note is not paid, an action may be brought upon the note, or on the original cause of action, unless the facts show that the promisee took the note in payment, or the law implies it, as in Massachusetts and Maine. (*z*)

It seems that a suit on a written contract, as a note of hand, may be barred by proof of the execution of a parol contract, entered into concurrently with the written contract and agreed to be taken in satisfaction of it. (*a*)

(*v*) Com. Dig. tit. Accord, (B. 4.)

(*w*) Ib.

(*x*) If such is the intent and effect of the new agreement, the remedy on the original cause is wholly gone. See *supra*, n. (*s*). And see further Lewis *v.* Lyster, 2 C. M. & R. 704; Kearslake *v.* Morgan, 5 T. R. 513; Richardson *v.* Rickman, cited in Kearslake *v.* Morgan, 5 T. R. 513; Griffiths *v.* Owen, 13 M. & W. 63.

(*y*) Kendrick *v.* Lomax, 2 Cr. & Jer. 405. In this case after a bill of exchange became due, and whilst it was in *London*, where it had been sent to be presented for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action on the first bill against the acceptor. *Held*, that he was not entitled to recover. And see Sayer *v.* Waggstaff, 5 Beav. 415; Simon *v.* Lloyd, 2 C. M. & R. 187.

(*z*) See *ante*, p. 136, nn. (*o*), (*p*).

(*a*) Thus, where upon the indorsement of a note it was agreed by parol between the indorser and indorsee, that if the former would execute to the latter a deed for a tract of land the latter would strike out the indorsement and release the indorser from all liability thereon, and the indorser did afterwards execute a deed for the tract of land,

An agreement to cancel and release mutual claims, or to discontinue mutual suits, is a mutual accord and satisfaction; and either party may rely on it as a bar against the further prosecution of the suit or claim by the other; (*b*) but to make this effectual as to mutual suits, the mutual release should be under seal.

Nor is it necessary, as we have seen, that the accord and satisfaction should go so far as to extinguish the original claim. If there be a new agreement, resting on sufficient consideration and otherwise valid, to suspend a previous claim or cause of action, until the doing of a certain thing, or the happening of a specified event, an action cannot be maintained on that claim in the mean time. But such agreement to suspend or delay will not be inferred from the mere giving of collateral security with power to sell the same at a certain time if the debt be not previously paid. (*c*)

To show that the accord and satisfaction were simultaneous, and consisted of the delivery of a certain thing, it must be proved, not only that the thing was delivered, but that it was received in satisfaction. (*d*) This delivery need

which was accepted by the indorsee; *Held*, that proof of these facts was not evidence tending to establish a contract variant from that contained in the written indorsement, and was competent to establish an accord and satisfaction. Smitherman *v.* Smith, 3 Dev. & Bat. 89. So where P. and the defendant agreed to purchase a vessel together, and the defendant, having received $190 of P., for which he gave his note on demand, purchased the vessel in his own name, and afterwards signed a writing which set forth that a portion of the vessel was to belong to P. upon his paying therefor, and acknowledged the receipt of $190 towards such payment, which was admitted to be the same money for which the note was given, and such writing was accepted by P.; it was held that this was an accord and satisfaction of the note, although it was not cancelled. Peck *v.* Davis, 19 Pick. 490.

(*b*) Thus in Vedder *v.* Vedder, 1 Denio, 257, A. and B. having mutual causes of action in *tort* against each other had an interview to adjust the demands of B.; and for the satisfaction of such demands, A. paid him a sum of money and took his receipt; but B. insisted as a condition to such adjustment that A. should execute to him a receipt in "full of all demands" on his part, to which A. consented, and such receipt was given, nothing being said respecting the particular demand of A. *Held*, notwithstanding, that it was a good accord and satisfaction of A's cause of action against B. So in Foster *v.* Trull, 12 Johns. 456, it was held, that an agreement by two, having each an action for false imprisonment pending against the other, to discontinue their respective actions, and an actual discontinuance accordingly, are a good accord and satisfaction.

(*c*) Emes *v.* Widdowson, 4 C. & P. 151.

(*d*) Maze *v.* Miller, 1 Wash. C. C. 328; Sinard *v.* Patterson, 3 Blackf. 354; Hall *v.* Flocton, 4 Eng. Law & Eq. R. 185; State Bank *v.* Littlejohn, 1 Dev. & Batt. 565. And it is entirely a question for the jury, whether there was an acceptance. Every *receipt* is not an acceptance. To constitute an accept-

not have been voluntary, or intended by way of satisfaction. But if the property of the debtor come lawfully into possession of the creditor, and they then agree that it may be retained by him and shall be in satisfaction of the debt, this would be regarded as a good accord and satisfaction. (*e*)

The accord and satisfaction must be advantageous to the creditor. (*f*) He must receive from it a distinct benefit,

ance there must be an act of the will. Hardman *v.* Bellhouse, 9 M. & W. 600. Brenner *v.* Herr, 8 Penn. St. 106. So whether a note or bond is accepted in satisfaction of an original claim, or only as collateral security, is for the jury. Stone *v.* Miller, 16 Penn. St. 450.

(*e*) Thus in Jones *v.* Sawkins, 5 C. B. 142, in an action of debt for use and occupation of certain rooms and apartments of the plaintiff, the defendant pleaded; — 1st. That the plaintiff during the demise, and before the commencement of the suit, took the defendant's goods as a distress, they being of sufficient value to satify the rent and costs of the distress, &c.; that the plaintiff never sold the goods but retained them until just before the commencement of the suit, when he, with the assent of the defendant received and accepted them, and still retained them in satisfaction, &c. 2d. That after the accruing of the causes of action and before the commencement of the suit, the plaintiff wrongfully seized the defendant's goods, being of value more than sufficient to satisfy the causes of action, and retained them for an unreasonable time, to wit, &c., and converted them; that it was before the commencement of the suit agreed between the plaintiff and defendant that, for the termination of disputes between them concerning the causes of action in the declaration, and claims made by the defendant in respect of the seizure and conversion, such demands and rights of action should be mutually relinquished, and that the plaintiff should retain the goods as a final settlement in full satisfaction and discharge of the said causes of action; and that the plaintiff accepted and received, and still retained the said goods in such full satisfaction and discharge. 3d. That the plaintiff wrongfully seized the defendant's goods to the value of all the moneys in the declaration mentioned, and detained the goods for an unreasonable time, and converted them, and wrongfully disturbed the defendant in the peaceable possession of the rooms; that the plaintiff was desirous of regaining possession of the rooms; that after the accruing of the causes of action, and before the commencement of the suit, it was agreed between the plaintiff and the defendant that, to put an end to disputes in respect of the causes of action in that plea mentioned, and other alleged causes of action on the part of the defendant, they should mutually relinquish their claims, that the plaintiff should retain the goods in full satisfaction and discharge of his claim, and that the defendant should relinquish her right to, and give up possession of the rooms, and should be discharged by plaintiff from all claims, and that the defendant accordingly relinquished her claims to, and gave up possession during the tenancy, and the plaintiff resumed, and still retained possession of the rooms, and retained the goods so seized, in satisfaction and discharge of the causes of action:—*Held*, that the pleas were good pleas of accord and satisfaction. *Held*, also, that the replications,—which in substance alleged that the plaintiff did not seize or detain any goods of the defendant of sufficient value to satisfy the rents and costs, or, of value sufficient for a full satisfaction and discharge of the causes of action,—were bad, as raising an immaterial issue.

(*f*) Thus, it is settled that a mere receipt by a creditor of part of his debt then due, is not a good defence by way of accord and satisfaction, to an action for the remainder, although the creditor agreed to receive it in full satisfaction. See *ante*, pp. 130, 131, and notes. And see further, Warren *v.* Skinner, 20 Conn. 559, an excellent case; Daniels *v.* Hatch, 1 New Jersey, 391; Adams *v.* Tapling, 4 Mod. 88; Worthington *v.* Wigley 3 Bing. N. C. 454; Smith *v.* Barthole

which otherwise he would not have had. (*g*) Thus, to an action for wrongfully taking cattle it is no plea that it was agreed that plaintiff might have them again; for this the law would have given him; and the return of the cattle is not a satisfaction for the injury caused by the detention of them. (*h*) But although it has been held that the thing given in satisfaction must have a distinct value *at law*, and therefore the release of equities of redemption could not be a satisfaction for want of such value, (*i*) it cannot be doubted, that if the satisfaction be actual, and have a real value in fact, either at law or in equity, it would be held sufficient.

We have seen that a promise, without execution, is no satisfaction, unless it has this effect by express agreement. And on the same principle, if the promise be executed literally, or in form, but is rendered inoperative or worthless to the creditor by the debtor's act or omission, this has no effect as an accord and satisfaction. (*j*)

mew, 1 Met. 276; Mitchell *v.* Cragg, 10 M. & W. 367; Greenwood *v.* Lidbetter, 12 Price, 183; Hinckley *v.* Arey, 27 Maine, 362; Hardey *v.* Coe, 5 Gill, 189; White *v.* Jordan, 27 Maine, 370; Eve *v.* Moseley, 2 Strobb. 203. But this rule applies only when the claim thus settled is a *liquidated* and undisputed one. Longridge *v.* Dorville, 5 B. & Ald. 117; Wilkinson *v.* Byers, 1 Ad. & El. 106; Reynolds *v.* Pinhowe, Cro. Eliz. 429; Atlee *v.* Backhouse, 3 M. & W. 651; McDaniels *v.* Lapham, 21 Verm. 223; Stockton *v.* Frey, 4 Gill, 406; Palmerton *v.* Huxford, 4 Denio, 166; Tuttle *v.* Tuttle, 12 Met. 551. And if the debtor give his *negotiable* note for part of an undisputed debt, and this be accepted in full satisfaction, the right to sue for the balance is gone. See *ante*, p. 131, n. (*x*). Or the note of a *third person*. See *ante*, p. 131, n. (*y*); Booth *v.* Smith, 3 Wend. 66. In Bruce *v.* Bruce, 4 Dana, 530, the defendant pleaded that the plaintiff had agreed to accept the promise of a third person, in full satisfaction of the note sued on. The only evidence in support of the plea was an indorsement signed by the third party, and in these words: "I am to pay the within note;" and a credit, of the same date, still legible, though lines had been drawn through it, for a sum paid by the third party. *Held*, that this was no evidence of an accord and satisfaction of the note which remained in the plaintiff's possession. So if the creditor derives any benefit from the part payment, to which he was not entitled, and he accepts this additional benefit, together with the part payment, as a full satisfaction, this is a good discharge of his whole claim. Douglass *v.* White, 3 Barb. Ch. R. 621; Hinckley *v.* Arey, 27 Maine, 362. As if part is paid and received in full satisfaction before the whole is due. Brook *v.* White, 2 Metc. 283; Goodnow *v.* Smith, 18 Pick. 414; Smith *v.* Brown, 3 Hawks, 580. And if the creditor receives any specific property, either from the debtor or a third person, in full satisfaction, this is a good discharge whatever be the value of the thing thus received, there being no fraud. Reed *v.* Bartlett, 19 Pick. 273; Blinn *v.* Chester, 5 Day, 360. And see *ante*, p. 131, n. (*x*.)

(*g*) See preceding note.

(*h*) Keeler *v.* Neal, 2 Watts, 424. A plea of accord, &c., must show that the plaintiff received something valuable. Davis *v.* Noaks, 3 J. J. Marsh. 497; Logan *v.* Austin, 1 Stewart, 476.

(*i*) Preston *v.* Christmas, 2 Wils. 86.

(*j*) Thus in Turner *v.* Browne, 3 C. B. 157, in debt for money had and re-

If the accord and satisfaction be made by a third party, and is accepted as satisfaction, it would seem to be sufficient, if the actual debtor consent to look upon it as such. (*k*) At least this must be the case where the debtor and the stranger are principal and agent, or the transaction is such that the debtor may make it the act of the stranger as his agent, by his subsequent adoption and ratification.

An accord and satisfaction made *before* breach of covenant or contract, is not a bar to an action for a subsequent breach. (*l*)

SECTION VI.

OF ARBITRAMENT AND AWARD.

Somewhat analogous to the defence of accord and satisfaction, is that of arbitrament and award. By the first, the parties have agreed as to what shall be done by one to satisfy the claim of the other. By the second they have agreed to submit this question to third persons. (*m*) The first essen-

ceived, &c., the defendant pleaded, that after the accruing of the debts and causes of action, the defendant executed a deed, securing to the plaintiff a certain annuity, and that the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of all the said several debts and causes of action. The plaintiff replied that no memorial of the annuity deed was enrolled pursuant to the statute; that the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears, that the defendant pleaded in bar of that action the non-enrolment of the memorial, and that thereupon the plaintiff elected and agreed that the indenture should be null and void, as pleaded by the defendant, and discontinued the action:—*Held*, a good answer to the plea, inasmuch as it showed that the accord and satisfaction thereby set up had been rendered nugatory and unavailing by the act of the defendant himself. Upon the same principle it was held in Hall *v.* Smallwood, Peake's Add. Cas. 13, that if a bill of sale of goods is given in satisfaction of a bond debt, and it is afterwards discovered that the obligor had previously committed an act of bankruptcy, the obligee may abandon the bill of sale and sue out a commission against the obligor, and a co-obligor cannot plead the bill of sale as an accord and satisfaction, in an action against him on the bond.

(*k*) Booth *v.* Smith, 3 Wend. 66; Webster *v.* Wyser, 1 Stew. 184.

(*l*) And it is immaterial whether the covenant is to pay at a time certain, or upon a contingency. Healey *v.* Spence, 20 Eng. Law & Eq. 476; Mayor of Berwick, *v.* Oswald, 16 Eng. Law & Eq. 236; Snow *v.* Franklin, 1 Lutw. 358; Alden *v.* Blague, Cro. Jac. 99; Neal *v.* Sheaffield, id. 254; Kaye *v.* Waghorne, 1 Taunt. 428; Smith *v.* Brown, 3 Hawks, 580; Harper *v.* Hampton, 1 Harris & J. 673.

(*m*) The submission is, in fact, a *contract;* a contract to refer the subject in dispute to others, and to be bound by their award. And the submission itself

tial therefore of an award, without which it has no force whatever, is, that it be conformable to the terms of the submission. (*n*) The authority given to the arbitrators should not be exceeded, and the precise question submitted to them, and neither more nor less, should be answered. Neither can the award affect strangers; and if one part of it is that a stranger shall do some act, it is not only of no force as to the stranger, but of no force as to the parties, if this unauthorized part of the award cannot be severed from the rest. (*o*) Nor can it require that one of the parties should make a payment or do any similar act to a stranger. (*p*) But if the stranger is mentioned in an award only as agent of one of the parties, which he actually is, or as trustee, or as in any way paying for, or receiving for one of the parties, this does not invalidate the award. (*q*) And in favor of awards, it has been

implies an agreement to abide the result, although no such agreement be *expressed*. Stewart *v.* Cass, 16 Vermont, 663; Valentine *v.* Valentine, 2 Barb. Ch. 430. And a submission is valid and binding, although there is no agreement that judgment may be entered on the award. Howard *v.* Sexton, 4 Comst. 157.

(*n*) 1 Rol. Abr. tit. Arbitrament, (E); Hide *v.* Petit, 1 Ch. Cas. 185; Solomons *v.* McKinstry, 13 Johns. 27. Neither arbitrators nor courts can substitute another agreement for the one actually made by the parties. Howard *v.* Edgell, 17 Vermont, 9.

(*o*) 1 Rol. Abr. tit. Arbitrament, (E.) An award directing a *qui tam* action to cease, is therefore bad. Philips *v.* Knightley, Strange, 903. So an award that a stranger to the submission should give bond as a security, for the performance of the award; or that one party's wife and *son* should join in a conveyance, is invalid. Com. Dig. Arbit. (E. 1); Pits *v.* Wordal, Godb. 165; Keilwey, 43 *a*, pl. 10. So, that an action by one party and his *wife*, against the other party should be discontinued. Com. Dig. Arbit. (D. 4.); that the *servant* of one party should pay a certain sum. Dudley *v.* Mallery, cited in Norwich *v.* Norwich, 3 Leonard, 62. Or an award that one party should *become* bound with *sureties* for the performance of any particular act. Oldfield *v.* Wilmer, 1 Leon. 140; Coke *v.* Whorwood, 2 Lev. 6; that the party and one *who had become* surety in the submission bond, should pay the sum awarded. Richards *v.* Brockenbrough, 1 Rand, 449. And an award against one company will not bind another company, consisting *in part* of the same persons. Kratzer *v.* Lyon, 5 Penn. St. 274. Strangers to the submission may in some instances be bound by silently acquiescing in an award. Govett *v.* Richmond, 7 Simons, 1. And see Humphreys *v.* Gardner, 11 Johns. 61; Downs *v.* Cooper, 2 Q. B. 256. An award that one party shall cause a stranger to do a certain act, as to deliver possession of land, is void. Martin *v.* Williams, 13 Johns. 264. Or that one party should erect a stile and bridge on the premises of a stranger. Turner *v.* Swainson, 1 M. & W. 572. But an award directing one party *and others* to convey certain premises to the other, *or* that he alone should pay a certain sum in money is not invalid as to the last part. Thornton *v.* Carson, 7 Cranch, 596.

(*p*) Bretton *v.* Prat, Cro. Eliz. 758; 1 Rol. Abr. tit. Arbitrament, (B), pl. 7. Adams *v.* Statham, 2 Lev. 235.

(*q*) Com. Dig. Arb. (E. 7.); Dudley *v.* Mallery, cited in Norwich *v.* Norwich, 3 Leon. 62; Bird *v.* Bird, Salk. 74; Bedam *v.* Clerkson, Ld. Raym. 123; Snook *v.* Hellyer, 2 Chitty, 43; Gale *v.* Mottram, W. Kel. 127; Lynch *v.* Cle-

said that this will be supposed, where the contrary is not indicated. (*r*)

If the award embrace matters not included in the submission it is fatal. (*s*) If, however, the portion of the award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejected as surplusage, and the rest will stand; otherwise the whole is void. (*t*) If the submission specify the particulars to which it refers, or if, after general words it make specific exceptions, its words must be strictly followed. (*u*) But if these words are very general, they will be construed liberally, but yet

mence, 1 Lutw. 571; Macon *v.* Crump, 1 Call, 500; Inh. of Boston *v.* Brazier, 11 Mass. 447; Beckett *v.* Taylor, 1 Mod. 9, 2 Keb. 546; Bradsey *v.* Clyston, Cro. Car. 541.

(*r*) Bird *v.* Bird, 1 Salk. 74. But see Wood *v.* Adcock, 9 Eng. Law & Eq. R. 524, that the onus of showing that a payment to a third person is for the benefit of a party to the submission, lies on the party seeking to enforce the award. And see In Re Mackay, 2 Ad. & Ell. 356; Snook *v.* Hellyer, 2 Chitty, 43.

(*s*) Brown *v.* Savage, Cas. tem. Finch, 185; Warren *v.* Green, id. 141; Lynch *v.* Clemence, 1 Lutw. 571; Waters *v.* Bridges, Cro. Jac. 639; Hill *v.* Thorn, 2 Mod. 309; Doyley *v.* Burton, Ld. Raym. 533; Bonner *v.* Liddell, 1 Brod. & Bing. 80; Culver *v.* Ashley, 17 Pick. 98. In this last case all demands between the parties were submitted to arbitration, and the arbitrators were authorized, in case they should find the plaintiff indebted to the defendant, to estimate the value of certain chattels of the plaintiff, and the defendant was to take them in part payment. The arbitrators found the plaintiff indebted to a less amount than the value of the chattels, but, instead of appraising so much only of the chattels as would pay the debt, they awarded that the defendant should take them and pay the plaintiff in money the excess of their value beyond the amount of the debt. *Held*, that the arbitrators had exceeded their authority and that the award was invalid. See also Shearer *v.* Handy, 22 Pick. 417; In Re Williams, 4 Denio, 194; Thrasher *v.* Haynes, 2 N. H. R. 429; Pratt *v.* Hackett, 6 Johns. 14.

(*t*) Taylor *v.* Nicolson, 1 Hen. & Mun. 67; Richards *v.* Brockenbrough, 1 Rand. 449; McBride *v.* Hagan, 1 Wend. 326; Clement *v.* Durgin, 1 Greenl. 300; Philbrick *v.* Preble. 18 Maine, 255; Banks *v.* Adams, 23 Maine, 259; Lyle *v.* Rodgers, 5 Wheat. 394; Walker *v.* Merrill, 13 Maine, 173; Gordon *v.* Tucker, 6 Greenl. 247; Pope *v.* Brett, 2 Saund. 293, and note 1; Addison *v.* Gray, 2 Wils. 293; Cromwell *v.* Owings, 6 H. & J. 10; Martin *v.* Williams, 13 Johns. 264; Cox *v.* Jagger, 2 Cow. 638; Gomez *v.* Garr, 6 Wend. 583, 9 Wend. 649; Brown *v.* Warnock, 5 Dana, 492. For it is well settled that an award may be good in part, and bad in part. Rixford *v.* Nye, 20 Verm. 132; Fox *v.* Smith, 2 Wilson, 267; Addison *v.* Gray, id. 293. The objection that the award does not follow the submission is one that may be waived by the parties, and their promise to abide by it, or other acquiescence, may render it valid. McCullough *v.* Myers, Hardin, 197; McDaniell *v.* Bell, 3 Hayes, 258; Culver *v.* Ashley, 19 Pick. 300; Frothingham *v.* Haley, 3 Mass. 70; Cairnes *v.* Bleecker, 12 Johns. 300. And the party in whose favor an award is made, cannot object that a certain particular found for him was not authorized by the submission. Galvin *v.* Thompson, 13 Maine, 367. A *fortiori* third persons can not impeach an award because it does not follow the submission, if the parties themselves do not object. Penniman *v.* Patchin, 6 Verm. 325.

(*u*) Scott *v.* Barnes, 7 Penn. St. 134.

without extending them beyond their fair meaning. (*v*) On the other hand, all questions submitted must be decided, unless the submission provides otherwise; (*w*) and either party may object to an award that it omits the decision of some question submitted; but the objection is invalid if it be shown that the party objecting himself withheld that question from the arbitrators. (*x*) Nor is it necessary that the award embrace all the topics which might be considered within the terms of a general submission. It is enough if it pass upon those questions brought before the arbitrators, and they are so far distinct and independent that the omission of others leaves no uncertainty in the award. (*y*) If the award does not embrace all of the matters within the submission

(*v*) Munro *v.* Alaire, 2 Caines, 320. A submission of *all demands* extends to real, as well as personal property. Byers *v.* Van Deusen, 5 Wend. 268. A submission of "all business of whatever kind in dispute between the parties," includes a prosecution for an assault and battery, pending. Noble *v.* Peebles, 13 S. & R. 18. A submission of "all causes of action," includes a charge of fraud in a sale of certain property. De Long *v.* Stanton, 9 Johns. 38. But a submission of "all unsettled accounts" does not authorize an award dividing all the personal property owned in common by the two parties, and that each should pay one half the debts contracted by either, and that one should pay the other $250. Shearer *v.* Handy, 22 Pick. 417. Under a submission of all demands, prospective damages on a bond of indemnity then outstanding may be taken into consideration. Cheshire Bank *v.* Robinson, 2 N. H. R. 126.

(*w*) Browne *v.* Meverell, Dyer, 216, *b.*; Cockson *v.* Ogle, 1 Lutw. 550; Freeman *v.* Baspoule, 2 Brownl. 309; Bean *v.* Newbury, 1 Lev. 139; Winter *v.* Munton, 2 Moore, 729; Richards *v.* Drinker, 1 Halst. 307; Jackson *v.* Ambler, 14 Johns. 96; Wright *v.* Wright, 5 Cow. 197. If, however, after the making of the submission, some portion of the claims embraced in it be withdrawn from the consideration of the arbitrators, by an agreement of the parties, and an award be published, with their assent, embracing only the remaining claims, such an award will be valid. Varney *v.* Brewster, 14 N. H. 49. If the award does not, in terms, decide all the matters submitted, yet if the thing awarded necessarily includes all other things and matters mentioned in the submission, this is sufficient. Smith *v.* Demarest, 3 Halsted, 195. The omission of some items must clearly appear. McKinstry *v.* Solomons, 2 Johns. 57, 13 id. 27; Kleine *v.* Catara, 2 Gall. 61; Karthaus *v.* Ferrer, 1 Pet. 222. See further, Winter *v.* White, 3 J. B. Moore, 674, 1 Bood & Bing. 350; Athelstan *v.* Moon, Com. Rep. 547; Harris *v.* Wilson, 1 Wend. 511; Kilburn *v.* Kilburn, 13 Meeson & Welsb. 671.

(*x*) Page *v.* Foster, 7 N. H. R. 392. And see Smith *v.* Johnson, 15 East. 213; Metcalf *v.* Ives, Cas. tem. Hard. 389. Under a *sealed* submission, the parties cannot, at the hearing, by a *parol* agreement, withdraw one item embraced in the submission. Howard *v.* Cooper, 1 Hill, 44.

(*y*) McNear *v.* Bailey, 18 Maine, 251; Pinkerton *v.* Caslon, 2 B. & Ald. 704; Garland *v.* Noble, 1 J. B. Moore, 187. Arbitrators are presumed to have acted upon all matters submitted, until the contrary is shown. Parsons *v.* Aldrich, 6 New Hampsh. 264; Emery *v.* Hitchcock, 12 Wend. 157. But see King *v.* Bowen, 8 M. & W. 625.

which were brought to the notice of the arbitrators it is altogether void. (*z*)

In the next place, an award must be *certain;* that is, it must be so expressed that no reasonable doubt can be entertained as to the meaning of the arbitrators, the effect of the award, or the rights and duties of the parties under it. (*a*)

(*z*) In Houston *v.* Pollard, 9 Met. 164, by an agreement of submission to arbitration, the arbitrators were to determine between A. and B., 1st, whether A. had finished a certain dwelling-house according to his contract with B., and what, if any thing, remained to be done upon the house by A., and how much, if any thing, remained to be paid by B. to A., and what damage, if any, should be deducted and allowed to B. for the failure of A. to perform the agreement to build the house; 2d, to determine and decide what amount, if any, remained to be advanced by B. to A., and what remained to be done, if any thing, by A., upon a certain other dwelling-house, to finish it, conformably to another contract between him and B.; and the parties agreed to do and perform to each other whatever might be ordered by the arbitrators to be done by them respectively. The arbitrators awarded that B. should pay a certain sum to A. in fulfilment of the contract for building the first-mentioned house, and that another certain sum remained to be advanced by B. to A. in fulfilment of the contract for building the other house. *Held*, that the arbitrators had not decided all the matters submitted to them, and that their award was therefore bad. See also In Re Rider and Fisher, 3 Bing. N. C. 874, where, in a dispute upon a building contract, arbitrators were to award on alleged defects in the building, on claims for extra work, and deductions for omissions, and to ascertain what balance, if any, might be due to the builder. An award, ordering a gross sum to be paid to the builder, without any decision on the alleged defects, was held ill.

(*a*) Hawkins *v.* Colclough, 1 Burr. 275; Schuyler *v.* Van Der Veer, 2 Caines, 235, an excellent case on this subject. And it is not sufficient merely that the parties and the arbitrators *could* understand it. The award should be in terms so clear and intelligible that every one who reads it may comprehend it. Gratz *v.* Gratz, 4 Rawle, 411. A few instances of a fatal uncertainty in awards are given below. Thus, an award directing one party to give a bond, without saying in what sum. Samon's case, 5 Rep. 77. And see Bacon *v.* Dubarry, 1 Ld. Raym, 246. To give "good security" for a certain sum, without saying what security. Jackson *v.* De Long, 9 Johns. 43; Thinne *v.* Rigby, Cro. Jac. 314; Tipping *v.* Smith, 2 Strange, 1024; Duport *v.* Wildgoose, 2 Bulstr. 260; Barnet *v.* Gilson, 3 Serg. & R. 340. But see Peck *v.* Wakely, 2 McCord, 279, where an award to give "sufficient indemnity" was held not uncertain, these words being construed to mean, the defendant's own personal obligation. So to convey the right of one party to *said* farm, when no farm had been mentioned. Brown *v.* Hankerson, 3 Cowen, 70; or that one party should pay £5, *and other small things*. Rudston *v.* Yates, March, 144; or much as should be due in conscience. Watson *v.* Watson, Styles, 28; or as much as certain land should be worth. Titus *v.* Perkins, Skinner, 248; or as much as a quarter of malt should be worth. Hurst *v.* Bumbridge, 1 Rol. Abr. tit. Arb. (Q.) pl. 7; that one party should give up a certain obligation, dated of a given date, but not otherwise identifying it. Sheppard *v.* Stites, 2 Halst. 90. And see McKeen *v.* Allen, 2 Harrison, 506; Bedam *v.* Clerkson, Ld. Raym. 124. Or to give up "*several* books." Cockson *v.* Ogle, 1 Lutw. 550; or an award of three fourths of the whole land purchased of C. F., to be *taken off the upper* part of said land. Duncan *v.* Duncan, 1 Iredell, 466. *Contra*, of an award that one party should convey to the other all the lands he held by a certain deed from A. Whitcomb *v.* Preston, 13 Vermont, 53. See other instances in Clark *v.* Burt, 4 Cush. 396; Thomas

For the very purpose of the submission, and the end for which the law favors arbitration, is the final settlement of all ques-

v. Molier, 3 Ham. 266; White *v.* Barry, 12 Wend. 377; Young *v.* Reuben, 1 Dall. 119; Hazen *v.* Addis, 2 Green, 333; Hopcraft *v.* Hickman, 2 Sim. & Stew. 130; Walsh *v.* Gilmor, 3 Harr. & J. 383; Lyle *v.* Rodgers, 5 Wheaton, 394; Stonehewer *v.* Farrar, 9 Jurist, 203; Parker *v.* Eggleston, 5 Blackf. 128; McDonald *v.* Bacon, 3 Scam. 428; Callahan *v.* McAlexander, 1 Ala. 366. In Lincoln *v.* Whittenton Mills, 12 Met. 31, an oral agreement was made by L., a land owner, and the owners of mills, who flowed his lands, to submit to referees the question, what damages he should receive. The referees made a written award, "that the Taunton Manufacturing Company, and the owners of mills, or their assigns, shall pay to L," a certain sum annually, "so long as said company and others keep up their dam, and flow as heretofore; with the understanding and agreement, that if said company and others shall discontinue their dam, the said L., his heirs or assigns, shall be entitled to such damages as it appears his land sustains in consequence of former flowing, until they arrive at their primitive goodness." The words "accepted and agreed to" were written on the award, and signed by L., and by "C. R. by authority of the flowers," and L. was paid, for several years, the amount mentioned in the award; but it did not appear by whom the payment was made. C. R. was not, at the time of his accepting the award, the agent of the Taunton Manufacturing Company, nor appointed by them for that purpose. The said company afterwards ceased to do business, and their mills passed to other owners, who continued to flow L.'s lands, but refused to pay the full amount of damages awarded by the referees, and offered him a less amount. L. refused to receive the amount so offered, and filed a complaint, in common form, under the Rev. Sts. c. 116, praying for a jury to estimate the damages caused by flowing his lands. *Held*, that the award was void, because it was neither certain nor final; that if the award had been valid, it would not have bound the respondents, on the facts of the case; and that L. was entitled to proceed on his complaint. And *Wild*, J., said, "This case turns on the question whether the award of arbitrators, relied on in the defence, is valid and binding on the parties to the present suit. An award is in the nature of a judgment, and, to be valid, must be certain and decisive as to the matter submitted, so that it shall not be a cause of a new controversy. Samon's case, 5 Co. 77; Bac. Ab. Arbitrament and Award, E. 2. And although an award may be good in part, and in part void, yet this rule applies only to awards in which the parts of the award are distinct and independent of each other. So an award may be conditional; but if the condition leads to a new controversy, the award is void. According to these principles, we are of opinion that the award in question is void, as being vague and uncertain, and not final as to the matter submitted to the arbitrators. The award is sufficiently certain as to the annual payment to be made by the owners of the reservoir dam to the complainant; but it is expressly on the understanding and agreement, that if the Taunton Manufacturing Company and others shall discontinue said dam, the complainant, his heirs and assigns, 'shall be entitled to such damage as it appears his lands sustained in consequence of former flowing, until they shall arrive at their primitive goodness.' It is clear, we think, by this part of the award, that it is not final and certain between the parties, but that the matter submitted is left open to a future controversy on the contingency of the discontinuance of the dam." In Johnson *v.* Latham, 4 Eng. Law & Eq. R. 203, an arbitrator had to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river, so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties. The arbitrator awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches, and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks:—*Held*, that the

tions and disputes; and this is inconsistent with uncertainty. But this certainly is not required to an unreasonable or impracticable degree; it should be a certainty to a common intent; and the nature of the subject should be considered; and if that which is left uncertain by the words of the award, can be made perfectly certain by a reference to a standard which the award presents, this is sufficient. (*b*) An award may be in the alternative. (*c*) If it be that one party shall pay the other a certain sum, but no time of payment be fixed, the award is not uncertain, because the sum awarded becomes payable immediately, or within a reasonable time. (*d*)

In the next place, the award must be *possible;* (*e*) for an award requiring that to be done which can not be done, is senseless and useless. But the impossibility which vitiates an award is one which belongs to the nature of the thing, and not to the accidental disability of the party at the time. (*f*) Thus, if he be ordered to pay money on a day that is past, this is void; (*g*) so if he be required to give up a deed which he neither has nor may expect to have; (*h*) but if he be directed to pay money, the award is good, although he has no money,

award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off.

(*b*) That certainty, to a common intent is sufficient, see Wood *v.* Earl, 5 Rawle, 44; Brown *v.* Warnock, 5 Dana, 492; Case *v.* Ferris, 2 Hill, 75; Doolittle *v.* Malcom, 8 Leigh, 608; Coxe *v.* Gent, 1 McMullan, 302; 1 Rol. Abr. tit. Arb. (H.) pl. 14; Cargey *v.* Aitcheson, 2 B. & C. 170; Doe d. Williams *v.* Richardson, 8 Taunt. 697; Cayme *v.* Watts, 3 D. & R. 224; Grier *v.* Grier, 1 Dall. 173; Kingston *v.* Kincaid, 1 Wash. C. C. 448. Thus, an award to pay the "taxable costs," is sufficiently certain. Nichols *v.* Rensselaer Mut. Ins. Co. 22 Wend. 125; Macon *v.* Crump, 1 Call, 575; Brown *v.* Warnock, 5 Dana, 492. So to pay a certain sum in 90 days, and interest. Skeels *v.* Chickering, 7 Met. 316. See Beale *v.* Beale, Cro. Car. 383; Furnis *v.* Hallom, Barnes, 166; Fox *v.* Smith, 2 Wils. 267; Bigelow *v.* Maynard, 4 Cush. 317; Pearson *v.* Archbold, 11 M. & W. 477; Bourke *v.* Lloyd, 10 M. & W. 550; England *v.* Davison, 9 Dowl. P. C. 1052; Martin *v.* Burge, 4 Ad. & El. 973; Purdy *v.* Delavan, 1 Caines, 304; Lutz *v.* Linthicum, 8 Pet. 165; Brickhouse *v.* Hunter, 4 Hen. & Mun. 363; Coxe *v.* Lundy, Coxe, 255.

(*c*) Oldfield *v.* Wilmer, 1 Leon. 140; Lee *v.* Elkins, 12 Mod. 585; Simmonds *v.* Swaine, 1 Taunton, 549; Commonwealth *v.* Proprietors, 7 Mass. 399; Wharton *v.* King, 2 B. & Ad. 528; Thornton *v.* Carson, 7 Cranch, 596.

(*d*) Freeman *v.* Baspoule, 2 Brownl. 309; Imlay *v.* Wikoff, 1 South. 132; Blood *v.* Shine, 2 Florida, 127. An award of "taxable costs" to be paid by one party is not void for uncertainty. That is certain which can be rendered certain. Wright *v.* Smith, 19 Verm. 110.

(*e*) Colwel *v.* Child, 1 Ch. Cas. 87; Kunckle *v.* Kunckle, 1 Dallas, 364.

(*f*) 1 Rol. Abr. tit. Arb. (B.) pl. 16; and see Wharton *v.* King, 2 B. & Ad. 528.

(*g*) 1 Rol. Abr. tit. Arb. (B.) pl. 17.

(*h*) Lee *v.* Elkins, 12 Mod. 585.

for it creates a valid debt against him. (*i*) Nor can a party avoid an award on the ground of an impossibility created by himself, after the award, or, perhaps, beforehand, if for the purpose of evading an expected award. (*j*)

This impossibility may be actual, or it may be that created by law; for an award which requires that a party should do what the law forbids him to do, is void, either in the whole, or for so much as is thus against the law, if that can be severed from the rest. (*k*)

An award must be *reasonable*; (*l*) if it be of things in themselves of no value or advantage to the parties or out of all proportion to the justice and requirements of the case, or if it undertake to determine for parties what they should determine for themselves, as that the parties should intermarry, it is void. It is not unreasonable, however, merely because it lays a burden on one party only, and requires nothing of the other. It used to be said, that *mutuality* was essential to an award. (*m*) It is certain now that this mutuality need not appear upon the face of the award; and indeed it can hardly be supposed necessary at all. (*n*) If A. and B. refer only a

(*i*) Bro. Abr. tit. Arb. pl. 39; 1 Rol. Abr. tit. Arb. (F.) pl. 2.

(*j*) Com. Dig. tit. Arb. (E. 12.)

(*k*) 1 Rol. Abr. tit. Arb. (G.) pl. 1. See Alder *v.* Saville, 5 Taunt. 454; Maybin *v.* Coulon, 4 Dallas, 298; Harris *v.* Curnow, 2 Chitty, 594; Turner *v.* Swainson, 1 M. & W. 572.

(*l*) See 1 Rol. Abr. tit. Arb. (B.) pl. 12, 13; Cooper *v.* ———, 3 Ch. Rep. 76, cited in 1 Vern. 157; Earl *v.* Stocker, 2 Vernon, 251; Cavendish *v.* ———, 1 Ch. Cas. 279. But a strong case of unreasonableness must be made out in order to induce courts to set aside an award; since the parties made choice of their own judge. See Wood *v.* Griffith, 1 Swanst. 43; Brown *v.* Brown, 1 Vern. 157, 2 Ch. Cas. 140; Waller *v.* King, 9 Mod. 63; Hardy *v.* Innes, 6 J. B. Moore, 574. As to the consistency required in an award, see Ames *v.* Millward, 2 J. B. Moore, 713.

(*m*) 1 Rol. Abr. tit. Arbit. (K). And see Gibson *v.* Powell, 5 Smedes & Marsh. 712; McKeen *v.* Oliphant, 3 Harr. 442.

(*n*) The doctrine of mutuality is not now applied in the strict sense it was formerly taken. Horrel *v.* McAlexander, 3 Rand. 94. It is not necessary that the same acts should be done by each party. Munro *v.* Alaire, 2 Caines, 320; Kunckle *v.* Kunckle, 1 Dall. 364. The doctrine of mutuality is fully expounded in Purdy *v.* Delavan, 1 Caines, 315, by *Kent*, J., and in Jones *v.* Boston Mill Corporation, 6 Pick. 148. In Onion *v.* Robinson, 15 Verm. 510, O. and W. having a claim against R. for money received, to their use, and R. alleging that he had paid it to O., they submitted the matter to arbitrators with authority to award costs and damages, who awarded that R. account to O. for a certain sum, in damages and costs. In a suit on the award in favor of O., it was held that there was no mutuality in the submission between O. and R., and, that neither the rights nor liabilities of either, were affected by the award. *Held*, also, that the submission and award, though legally invalid, might be given in evidence under a declaration setting forth the above facts.

claim which A. has on B., and the award is simply that B. pay A. a certain sum of money, it would be good, but it would have no element of mutuality that did not belong to it necessarily. (*o*)

Lastly, the award must be *final* and *conclusive*. (*p*) This necessity springs also from the very purpose for which the law favors arbitration, namely, the settlement and closing of disputes. (*q*) But here too, as on other points, the law is now more rational and less technical than it was formerly. Thus, it was once a rule that an award of nonsuit was not

(*o*) Weed *v.* Ellis, 3 Caines, 255; Gordon *v.* Tucker, 6 Greenl. 247; Gaylord *v.* Gaylord, 4 Day, 422; —— *v.* Palmer, 12 Mod. 234; Horton *v.* Benson, Freeman, 204; Doolittle *v.* Malcom, 8 Leigh, 608.

(*p*) See Goode *v.* Waters, 1 Eng. Law & Eq. R. 181; Carnochan *v.* Christie, 11 Wheat. 446. An award, which, after disposing of the claims of *some* of the parties, declared that as to the claims of certain other parties, they should be at liberty to prosecute the same, either at law or equity, in like manner as if the order of reference had never been made, is not final. Turner *v.* Turner, 3 Russ. Ch. R. 494. But an award directing the execution of mutual and general releases is final. Bell *v.* Gipps, 2 Ld. Raym. 1141; Birks *v.* Trippet, 1 Saunders, 32; Wharton *v.* King, 2 B. & Ad. 528. So of an award that plaintiff has no good cause of action. Dibben *v.* Marquis of Anglesea, 4 Tyrwh. 926; McDermott *v.* U. S. Ins. Co. 3 Serg. & R. 604; Craven *v.* Craven, 1 J. B. Moore, 403; Jackson *v.* Yabsley, 5 B. & Al. 849; Angus *v.* Redford, 11 M. & W. 69.

(*q*) An award settling the costs on both sides, without saying more, is final and conclusive. Buckland *v.* Conway, 16 Mass. 396; Traquair *v.* Redinger, 4 Yeates, 282; Hartnell *v.* Hill, Forrest, 73. An award that defendant should pay costs, without saying *to whom*, is not uncertain. Baily *v.* Curling, 4 Eng. Law & Eq. R. 201. In Hancock *v.* Reede, 6 Eng. Law & Eq. 368, H. & M. being partners, had covered wires with gutta percha for R., in pursuance of a contract. They afterwards assigned the partnership business to C. H., with power to him to take proceedings in their name for the recovery of debts due to them, to enforce existing contracts, and to deal in respect thereof as they themselves might have done. C. H., after the assignment, also covered wires for R. on his own account, and brought two actions against him, one in his own name, the other in the name of H. & M. It had been agreed between C. H. and R. to refer both actions, and all matters in difference, as well between H. & M. and R. as between C. H. and R., to arbitration; whereupon an order of reference was drawn up, and an award had been made:—*Held*, that the award was not bad for want of finality in awarding a discontinuance of H. & M.'s action without determining the cause of action, as it appeared that the discontinuance had been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in that action.—Where several issues are involved in the pleadings, and the whole case is referred, the costs to abide the result, it ought to appear that each issue was disposed of. See Pearson *v.* Archbold, 11 M. & W. 477; Bourke *v.* Lloyd, 10 M. & W. 550; Stonehewer *v.* Farrar, 6 Q. B. Rep. 730; Phillips *v.* Higgins, 5 Eng. Law & Eq. R. 295; Wilcox *v.* Wilcox, 4 Exch. 500; Kilburn *v.* Kilburn, 13 M. & W. 671. So where a cause, and *all matters in difference*, are referred, the costs to abide the result, the award ought to distinguish between the matters in the cause and other matters of difference. See Martin *v.* Burge, 4 Ad. & El. 973.

good, because not final, as the plaintiff might immediately renew his action; (*r*) but this would hardly be held now. An award of discontinuance of a suit has always been held sufficient. (*s*) It is not a valid objection to an award, that it is upon a condition, if the condition be clear and certain, consistent with the rest of the award, in itself reasonable, and such as to cause no doubt whether it were performed or not, or what were the rights or objections dependent upon it. (*t*)

Any delegation or reservation of their authority by the arbitrators, which would have the effect of leaving any thing to the future judgment or power of the arbitrators, would vitiate the award. (*u*) But where arbitrators are unable to decide accurately upon some particular point, requiring some technical knowledge, they may refer the settlement of the details to some third person having such knowledge, the arbitrators, however, accurately determining the principles by which such person is to be governed. (*v*)

(*r*) Knight *v.* Burton, Salk. 75; 1 Rol. Abr. tit. Arb. (I.) pl. 16; Philips *v.* Knightley, 1 Barnard. 463. But in Miller *v.* Miller, 5 Binn. 62, it was said that arbitrators had no power to award a nonsuit. Nor have they to arrest judgment, if their power be only to direct how a verdict shall be entered. Angus *v.* Redford, 11 M. & W. 69.

(*s*) Blanchard *v.* Lilley, 9 East. 497; Philips *v.* Knightly, 1 Barnard. 463; Linsey *v.* Ashton, Godb. 255; Ingram *v.* Webb, 1 Rol. 362. Or that plaintiff should enter a *retraxit*. 1 Rol. Abr. tit. Arb. (F.) pl. 7, (I.) pl. 18. Or that no suit should be brought by one party against the other on a certain bond. 1 Rol. Abr. tit. Arb. (O.) pl. 7. Or that *all* suits then pending between the parties should cease. Squire *v.* Grevell, 6 Mod. 33, Ld. Raym. 961, Salk. 74. Or that a chancery suit should be dismissed. Knight *v.* Burton, 6 Mod. 232, Salk. 75. See Purdy *v.* Delavan, 1 Caines, 304, for an able statement of the law upon this point by Mr. Justice *Kent*.

(*t*) Collet *v.* Podwell, 2 Keble. 670; Cockill *v.* Witherell, 2 Keble, 838; 1 Rol. Abr. tit. Arb. (H.) pl. 8; Furser *v.* Prowd, Cro. Jac. 423. An award that one party should pay the other a particular debt, in case it was not collected from another source, is valid. Williams *v.* Williams, 11 Sm. & Marsh. 393.

(*u*) Archer *v.* Williamson, 2 Harr. & Gill, 62; Levezey *v.* Gorgas, 4 Dallas, 71; Lingood *v.* Eade, 2 Atk. 501; Emery *v.* Emery, Cro Eliz. 726; Manser *v.* Heaver, 3 B. & Ad. 295; Tandy *v.* Tandy, 9 Dowl. P. C. 1044, 5 Jurist, 726. So an award that one party should put certain premises in good repair, to the satisfaction of a third party, has been held bad, *in toto*. Tomlin *v.* Mayor, &c. of Fordwich, 5 Ad. & El. 147. So an award that A. should beg B.'s pardon, in such form as B. should appoint, is an improper delegation of authority. Glover *v.* Barrie, Salk. 71; Lutw. 1597.

(*v*) See Emery *v.* Wase, 5 Vesey, 846; Anderson *v.* Wallace, 3 Cl. & Finn. 26; Sharp *v.* Nowell, 6 C. B. 258; Hopcraft *v.* Hickman, 2 Sim. & Stw. 130; Seale *v.* Fothergill, 8 Beav. 361; Church *v.* Roper, 1 Ch. Rep. 75; Lingood *v.* Eade, 2 Atk. 501; Cater *v.* Startute, Styles, 217; Furnis *v.* Hallom, Barnes, 166; Winter *v.* Garlick, Salk. 75, 6 Mod. 195; Worral

An award may be open to any or all of these objections in part, without being necessarily void in the whole. So much of it as is thus faulty, is void; but if this can be severed distinctly from the residue, leaving a substantial, definite, and unobjectionable award behind, this may be done, and the award then will take effect. (*w*) It is therefore void in the whole because bad in part, only where this part cannot be severed from the residue, or where, if it be severed and amended, leaving the residue in force, one of the parties will be held to an obligation imposed upon him, but deprived of the advantage or recompense which it was intended that he should have. (*x*)

Generally in the construction of awards, they are favored and enforced, wherever this can properly be done. If the intention of the arbitrators can be ascertained from the award with reasonable certainty, and this intention is open to no objection, a very liberal construction will be allowed as to form, or rather, a very liberal indulgence as to matters of form and expression. (*y*)

If it be necessary to make a presumption on the one side or the other, to give full force and significance to an award,

v. Akworth, 2 Kebl. 331; Hunter *v.* Bennison, Hard. 43; Galloway *v.* Webb, Hardin, 318.

(*w*) This is a perfectly well settled doctrine in the law of arbitrament and award; too well settled to need the citation of authorities. A few instances of the *application* of the principle are given by way of illustration. Thus, in an award that defendant should pay plaintiff a certain sum, *and also the costs of arbitration*, where the arbitrator had no power to award costs, that part is bad, but the rest is valid. Candler *v.* Fuller, Willis, 62; Fox *v.* Smith, 2 Wilson, 267; Addison *v.* Gray, 2 Wilson, 293; Gordon *v.* Tucker, 6 Greenl. (Bennett's Ed.) 247. So in an award directing a lease for life to one party, *and a remainder over in fee to a third person*, the last part was rejected, and the first supported. Bretton *v.* Prat, Cro. Eliz. 758. And so where part of the sum awarded to one party, was founded upon a claim, illegal in its nature, the other portion being separable. Aubert *v.* Maze, 2 B. & P. 371. So if an award directs one party to deliver up a deed not in his possession, *or* pay a sum of money, the last is good and the first bad, and the award is not invalid. Lee *v.* Elkins, 12 Mod. 585; Simmonds *v.* Swaine, 1 Taunt. 549; and see Wharton *v.* King, 2 B. & Ad. 528; Thornton *v.* Carson, 7 Cranch, 596; Skillings *v.* Coolidge, 14 Mass. 43.

(*x*) If the void part of the award was apparently intended by the arbitrators as the consideration, in whole or in part, of that portion which is good, or if the void part manifestly affected the judgment of the arbitrators, in respect to other matters, the whole is clearly void. See Pope *v.* Brett, 2 Saunders, 292, where part was void for uncertainty; Winch *v.* Sanders, Cro. Jac. 584, where part was void because the arbitrator had reserved to himself a future authority. See further Storke *v.* De Smeth, Willes, 66; Johnson *v.* Wilson, Willes, 248; Clement *v.* Durgin, 1 Greenl. (Bennett's Ed.) 300.

(*y*) Spear *v.* Hooper, 22 Pick. 144; Rixford *v.* Nye, 20 Verm. 132.

the court will incline to make that presumption which gives effect to the award, rather than one which avoids it. (*z*) Thus, it has been laid down, almost as a rule, and certainly as a maxim, that where the words of an award extend beyond those of the submission, it shall be understood that they are mere surplusage, because there is nothing between the parties more than was submitted; (*a*) and if the words of the award be less comprehensive than those of the submission, it shall be understood that what is omitted was not controverted, unless, in either case, the contrary is expressly shown. (*b*) And if the submission be in the most general terms, and the award equally so, covering "all demands and questions," &c., between the parties, yet either party may show that a particular demand either did not exist, or was not known to exist, when the submission was entered into, or that it was not brought before the notice of the arbitrators, or considered by them. (*c*)

There are certain words and phrases often used in awards, which seem to have acquired from practice a legal signification. Thus, "costs," will mean only the legal costs of court; and even "charges and expenses" mean no more, unless more be specially indicated. (*d*) Such at least is the English authority; but it might, perhaps, be expected that the courts of this country would execute the intention of the parties, and construe such very general words as these accordingly. So "releases" mean to the time of the submission, and have been so construed

(*z*) Armitt *v.* Breame, 2 Ld. Raym. 1076; Booth *v.* Garnett, 2 Strange, 1082; Rose *v.* Spark, Aleyn, 51.

(*a*) Alder *v.* Savill, 5 Taunt. 454; Solomons *v.* McKinstry, 13 Johns. 27.

(*b*) Knight *v.* Burton, 6 Mod. 231; Middleton *v.* Weeks, Cro. Jac. 200; Vanvivée *v.* Vanvivée, Cro. Eliz. 177; Webb *v.* Ingram, Cro. Jac. 664; Lewis *v.* Burgess, 5 Gill, 129; Roberts *v.* Mariett, 2 Saund. 188; Cable *v.* Rogers, 3 Bulstr. 311; Ward *v.* Unicorn, Cro. Car. 216; Bussfield *v.* Bussfield, Cro. Jac. 577.

(*c*) Ravee *v.* Farmer, 4 T. R. 146; Golightly *v.* Jelliceo, id. 147, *n.*; Thorpe *v.* Cooper, 5 Bing. 129; Seddon *v.* Tutop, 6 T. R. 607; Martin *v.* Thornton, 4 Esp. 180. But see Jones *v.* Bennett, 1 Bro. P. C. 411; Shelling *v.* Farmer, 1 Str. 646; Smith *v.* Johnson, 15 East, 213; Dunn *v.* Murray, 9 B. & C. 780.

(*d*) Fox *v.* Smith, 2 Wils. 267. And an award of costs *generally*, is understood to be costs to be taxed by the proper officer. See Dudley *v.* Nettlefold, Strange, 737. An award that the costs be paid immediately by one party, means that they are payable upon notice to such party. Hoggins *v.* Gordon, 3 Q. B. 466; Wright *v.* Smith, 19 Verm. 110; Safford *v.* Stevens, 2 Wend. 158; Barnes *v.* Parker, 8 Mete. 131.

even when the words used were "of all claims to the time of the award;" for the arbitrators had no authority to go beyond this limit. (*e*) And if by an award money is to be paid in satisfaction of a debt, this implies an award of a release on the other side, and makes this a condition to the payment. (*f*)

There is no especial form of an award necessary in this country. (*g*) If the submission requires that it should be sealed, it must be so. (*h*) And if the submission was made under a statute, or under a rule of court, the requirements of the statute or the rule should be followed. But even here mere formal inaccuracies would seldom be permitted to vitiate the award. If the submission contains other directions or conditions, as that it should be delivered to the parties in writing, or to each of the parties, such directions must be substantially followed. Thus, in the latter case, it has been held that it is not enough that a copy be delivered to one of the parties on each side, but each individual party must have one. (*i*)

(*e*) Making *v.* Welstrop, Freem. 462; White *v.* Holford, Sty. 170; Hooper *v.* Pierce, 12 Mod. 116; Squire *v.* Grevell, 6 Mod. 34; Abrahat *v.* Brandon, 10 Mod. 201; Herrick *v.* Herrick, 2 Keb. 431; Robinet *v.* Cobb, 3 Lev. 188; Nicholas *v.* Chapman, 3 Lev. 344.

(*f*) Mawe *v.* Samuel, 2 Roll. 1; —— *v.* Palmer, 12 Mod. 234; Brown *v.* Savage, Cas. temp. Finch, 184.

(*g*) It may be under seal, or in writing, or oral, if there is nothing in the submission to the contrary. Cable *v.* Rogers, 3 Bulstr. 311; Marsh *v.* Packer, 20 Verm. 198; Oates *v.* Bromell, Holt's R. 82.

(*h*) Stanton *v.* Henry, 11 Johns. 133; Rea *v.* Gibbons, 7 S. & R. 204.

(*i*) Huntgate *v.* Mease, Cro. Eliz. 885. *Sed quære.* See Pratt *v.* Hackett, 6 Johnson, 14. So, if by the submission, the award is to be *indorsed* on the submission, an award annexed to the submission by a wafer, is not valid. Montague *v.* Smith, 13 Mass. 396. But this seems too much like forsaking the substance, and clinging to the shadow. Perhaps the fact proved in that case, that the arbitrators by mistake annexed the wrong paper to the submission, was the real cause of the decision.—If the submission require the award to be attested by witnesses, such attestation is necessary, and the submission may be revoked at any time before such attestation, although the arbitrators have done all their duty. Bloomer *v.* Sherman, 5 Paige, 575; see Newman *v.* Labeaume, 9 Missouri, 30.—If by the submission the award must be ready for delivery at a day certain, the award is complete, if it be in fact ready on that day, although not delivered, and although some accident should occur by which it should never be delivered at all. Brown *v.* Vawser, 4 East, 584; and see Henfree *v.* Bromley, 6 East, 309; Macarthur *v.* Campbell, 5 B. & Ad. 518. In Brooke *v.* Mitchell, 6 M. & W. 473, where an order of reference required that the arbitrator should *make and publish* his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day, it was held that the award was "published, and ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of, and attested by witnesses, and that it could not

If an award be relied on in defence, the execution of the submission by each party, or the agreement and promise by each, if there was no submission in writing, must of course be proved, because the promise of the one party is the consideration for the promise of the others. (*j*)

An award is so far like a judgment that an attorney has been held to have a lien upon it for his fees; but it is not the same thing in all respects. (*k*)

It may happen, where an award is offered in defence, or as the ground of an action, that it is open to no objection whatever for any thing which it contains or which it omits; and yet it may be set aside for impropriety or irregularity in the conduct of the arbitrators, or in the proceedings before them. Awards are thus set aside if "procured by corruption or undue means," as is said in the stat. 9 and 10 Wm. 3, ch. 15, which is held as only declaratory of the law as it was before. This rule rests, indeed, on the common principle that fraud vitiates and avoids every transaction. So too it may well be set aside if it be apparent on its face that the arbitrator has made a material mistake of fact or of law. (*l*) It must, however, be a strong case in which the court would receive evidence of a mistake, either in fact or in law, which did not appear in the award, and was not supposed to spring from, or indicate corruption, and was not made out to the arbitrator's satisfaction. (*m*) It has been permitted to the

be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready. In Sellick *v.* Addams, 15 Johnson, 197, it was held that where sworn copies of an award are delivered to the parties by the arbitrators, and received without objection, this is a waiver of their right to receive the original award.

(*j*) Antram *v.* Chace, 15 East, 209.

(*k*) Ormerod *v.* Tate, 1 East, 464; Cowell *v.* Betteley, 4 Moore & Scott, 265; s. c. not as well reported upon this point in 10 Bing. 432. But see Dunn *v.* West, 1 Eng. Law & Eq. R. 325. See also Collins *v.* Powell, 2 T. R. 756, that there is a difference between money awarded, and money recovered by a judgment.

(*l*) See Aubert *v.* Maze, 2 B. & P. 371; Pringle *v.* McClenachan, 1 Dall. 487.

(*m*) This subject was very fully considered in The Boston Water Power Co. *v.* Gray, 6 Met. 131. From the able opinion of *Shaw*, C. J., we quote the following:—"It is clearly settled that an award is *primâ facie* binding upon the parties, and the burden of proof is upon the party who would avoid it. In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to

arbitrators to state a mistake of fact, which they afterwards discovered; but it would seem that the court cannot then

evidence, and the inferences of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law, necessary to the decision of the matters submitted; because they are judges of the parties own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata;* it is the *final judgment* for that case, and between those parties. It is amongst the rudiments of the law, that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. But this general rule is to be taken with some exceptions and limitations, arising either from the submission, or from the award itself, or from matter distinct from either. If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them, and decide accordingly. Then if it appears by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law, of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard, the necessary conclusion is, that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, as determined by the submission, and is for that reason void. But when the parties have expressly or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle, for a court of law or equity to rejudge the same question, as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous.— It has sometimes been made a question whether the court will not set aside an award, on the ground of mistake of the law, when the arbitrator is not a professional man, and decline inquiry into such mistake, when he was understood, from his profession, to be well acquainted with the law. Some of the earlier cases may have countenanced this distinction. But the probability is, that this distinction was taken rather by way of instance to illustrate the position, that when the parties intended to submit the questions of law as well as of fact, the award should be final, but otherwise not; which we take to be the true principle. But we think the more modern cases adopt the principle, that inasmuch as a judicial decision upon a question of right, by whatever forum it is made, must almost necessarily involve an application of certain rules of law to a particular statement of facts, and as the great purpose of a submission to arbitration usually is, to obtain a speedy determination of the controversy, a submission to arbitration embraces the power to decide questions of law, unless that presumption is rebutted by some exception or limitation in the submission. We are not aware that there is any thing contrary to the policy of the law in permitting parties thus to substitute a domestic forum for the courts of law, for any good reason satisfactory to themselves; and having done so, there is no hardship in holding them bound by the result. *Volenti non fit injuria.* On the contrary, there are obvious cases in which it is highly beneficial. There are many cases where the parties have an election of forum; sometimes it is allowed to the plaintiff, and sometimes to the de-

rectify the award, or do any thing but set it aside if the error be material, or, perhaps, in some cases, refer the case back again to the arbitrators. (*n*) If the submission authorize the

fendant. It may depend upon the amount or the nature of the controversy, or the personal relations of one or other of the parties. As familiar instances in our own practice, one may elect to proceed in the courts of the United States, or in a state court; at law or in equity; in a higher or lower court. In either case, a judgment in one is, in general, conclusive against proceeding in another. A very common instance of making a judgment conclusive by consent, is where a party agrees in consideration of delay, or some advantage to himself, to make the judgment of the court of common pleas conclusive, where, but for such consent, he would have a right to the judgment of the higher court. But where the whole matter of law and fact is submitted, it may be open for the court to inquire into a mistake of law, arising from matter apparent on the award itself; as where the arbitrator has, in his award, raised the question of law, and made his award in the alternative, without expressing his own opinion; or, what is perhaps more common, where the arbitrator expresses his opinion, and, conformably to that opinion, finds in favor of one of the parties; but if the law is otherwise, in the case stated, then his award is to be for the other party. In such case, there is no doubt, the court will consider the award conclusive as to the fact, and decide the question of law thus presented. Another case, somewhat analogous, is where it is manifest, upon the award itself, that the arbitrator intended to decide according to law, but has mistaken the law. Then it is set aside, because it is manifest that the result does not conform to the real judgment of the arbitrator. For then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide; and therefore, if such decision would be otherwise, it follows that he intended to decide the other way." See also Jones *v.* Boston Mill Corporation, 6 Pick. 148; Fuller *v.* Fenwick, 3 C. B. 705; Faviell *v.* Eastern Counties Railway Co., 2 Exch. 344; Kent *v.* Elstob, 3 East. 18; Kleine *v.* Catara, 2 Gallison, 61; Greenough *v.* Rolfe, 4 N. H. 357; Johns *v.* Stevens, 3 Vermont, 308; Bliss *v.* Robbins, 6 Vermont, 529; Wohlenberg *v.* Lageman, 6 Taunt. 254; Prentice *v.* Reed, 1 Taunt. 152; Badger, in re, 2 B. & Ald. 691; Bouttilier *v.* Thick, 1 Dow. & Ryl. 366; Richardson *v.* Nourse, 3 B. & Ald. 237; Delver *v.* Barnes, 1 Taunt. 48; Cramp. *v.* Symons, 1 Bing. 104; Anonymous, 1 Chitty, 674.

(*n*) As to the effect of a mistake in fact, see an elaborate review of the authorities by Ch. *Kent*, in Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339. See also The Boston Water Power Co. *v.* Gray, 6 Met. 131, cited *supra*, where *Shaw*, C. J., said:—"Another ground for setting aside the award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle stated in the preceding proposition, that the award does not conform to the judgment of the arbitrators, and the mistake, apparent in some material and important particular, shows that the result is not the true judgment of the arbitrators. The mistake, therefore, must be of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result. A familiar instance of this class of mistakes, is an obvious error in computation, by which the apparent result, in sums or times, or other things of like kind, is manifestly erroneous. In such case it is clear that the result stated is not that intended; it does not express the real judgment of the arbitrators. The class of cases in which the court will set aside an award, upon matter not arising out of the submission or award, is, where there is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judges chosen by the par-

arbitrators to refer questions of law to the court, this may be done; otherwise, such reference would, in general, either be itself declared void, or would have the effect of avoiding the award, because it prevented it from being certain, or final and conclusive. (*o*) The arbitrators, by a general submission, are required to determine the law; and only a decided and important mistake could be shown and have the effect of defeating the award; it has been said that only a mistake amounting to a perverse misconstruction of the law would have this effect; certainly a very great power is given to arbitrators in this respect, and it has even been expressly declared that they have not only all the powers of equity as well as of law, but may do what no court could do, in giving relief or doing justice. (*p*)

ties; the former is the result of prejudice uninfluenced by law and fact; the latter may be a true judgment, but upon a case falsely imposed on them by the fraud of a party. Under this class of cases, where the award may be set aside, upon matter not arising out of the submission or award, another was stated at the trial; that is, where the arbitrators make a mistake in matter of fact, by which they are led to a false result. This would not extend to a case where the arbitrators come to a conclusion of fact erroneously, upon evidence submitted to and considered by them, although the party impeaching the award should propose to demonstrate that the inference was wrong. This would be the result of reasoning and judgment, upon facts and circumstances known and understood; therefore a result which, upon the principles stated, must be deemed conclusive. But the mistake must be of some fact, inadvertently assumed and believed, which can now be shown not to have been as so assumed; and the principal illustration was that of using a false weight or measure, believing it to be correct. Suppose, as a further illustration, that a compass had been used to ascertain the bearings of points, and it should be afterwards found, that by accident, or the fraud of a party, a magnet had been so placed as to disturb the action of the needle, and this wholly unknown to the arbitrators; it is not a fact, or the inference of a fact, upon which any judgment or skill had been exercised, but a pure mistake, by which their judgment, as well as the needle, had been swerved from the true direction, which it would have taken had it followed the true law understood to govern it. One test of such a mistake is, that it is of such a kind, and so obvious, that when brought to the notice of the arbitrators, it would induce them to alter the result to which they had come in the particular specified. It is not to be understood that such mistake can be proved only by the testimony or by the admission of the arbitrators. They may, from various causes, be unable to testify, or may not be able to recollect the facts and circumstances sufficiently. It is not, therefore, as matter of law, confined to a case of mistake admitted or proved by the arbitrators; but it must be of a fact upon which the judgment of the arbitrators has not passed as a part of their judicial investigation, and one of such a nature, and so proved, as to lead to a reasonable belief that they were misled and deceived by it, and that if they had known the truth, they would have come to a different result."

(*o*) Sutton *v.* Horn, 7 S. & R. 228.

(*p*) The power of arbitrators to disregard strict principles of law, and to decide upon principles of equity and good conscience, was warmly claimed by *Story*, J., in Kleine *v.* Catara, 2 Gallison, 61,—"Under a general submission," said he, "the arbitrators have rightfully a power to decide on the law

Other grounds of objection to an award, are irregularity of proceedings. Thus, a want of notice to the parties furnishes a ground of objection to the award. (*q*) And for this pur-

and the fact; and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators. Besides, under such a general submission, the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex æquo et bono*. We hold, in this respect, the doctrine of Lord *Talbot* in the South Sea Company *v.* Bumbstead, of Lord *Thurlow* in Knox *v.* Simonds, of the King's Bench in Ainslie *v.* Goff, and of the Common Pleas in Delver *v.* Barnes. If, therefore, under an unqualified submission, the referees, meaning to take upon themselves the whole responsibility, and not to refer it to the court, do decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law, and mistake, and refer it to the court to review their decision, (as in all cases, where they specially state the principles, on which they have acted, they are presumed to do,) in such cases the court will set aside the award, for it is not the award which the referees meant to make, and they acted under a mistake. On the other hand, if knowing what the law is, they mean not to be bound by it, but to decide, what in equity and good conscience ought to be done between the parties, their award ought to be supported, although the whole proceedings should be apparent on the face of the award. And this, in our opinion, notwithstanding some contrariety, is the good sense to be extracted from the authorities. In Morgan *v.* Mather, Lord *Loughborough* lays it down as clear, that corruption, misbehavior, or excess of power, are the only grounds for setting aside awards; and although in the same case Mr. Commissioner *Wilson* says, that arbitrators cannot award contrary to law, because that is beyond their power, for the parties intend to submit to them only the legal consequences of their transactions and agreements; yet this reasoning is wholly unsatisfactory, not only from its being in direct opposition to very high authority. If, in the case before the court, the referees had made a general award, without any specification of the reasons of their decision, it would have deserved very grave consideration, whether we could, by collateral evidence, have examined into the existence of any errors of law. We are not prepared to say that such a course would be proper, unless the submission were restrained to that effect, or misbehavior were justly imputed to the referees. But here the referees have expressly laid the grounds of their decision before us, and have thereby submitted it for our consideration. This course is not much to be commended. Arbitrators may act with perfect equity between the parties, and yet may not always give good reasons for their decisions; and a disclosure of their reasons may often enable a party to take advantage of a slight mistake of law, which may have very little bearing on the merits. A special award, therefore, is very perilous; but when it is once before the court, it must stand or fall by its intrinsic correctness, tested by legal principles."

(*q*) Paschal *v.* Terry, Kelynge, 132; Rigden *v.* Martin, 6 Harr. & J. 403; Falconer *v.* Montgomery, 4 Dallas, 232; Lutz *v.* Linthicum, 8 Peters, 178; Peters *v.* Newkirk, 6 Cow. 103; Rivers *v.* Walker, 1 Dallas, 81; Webber *v.* Ives, 1 Tyler, 441; Craig *v.* Hawkins, Hardin, 46. In Crowell *v.* Davis, 12 Met. 293, C. and D. agreed to submit all disputed claims between them to the final award of B., and to abide by his decision; and that if B. should decline to act alone as referee, he might select one or two other referees to act with him; and that if he should decline altogether, the matters should be referred to such person or persons as he should select. B. declined to act, and appointed G., H. and I. as referees, on the 23d of March, of which appointment C. and D. had immediate notice, and G., as chairman of said referees, called on D., and in-

pose it is not necessary that the submission provide for giving such notice, because a right to notice springs from the agreement to submit. (*r*) But this rule is not of universal application, for there may be cases where all the facts have been agreed upon and made known to the arbitrators, and where the case does not depend upon the evidence, and no hearing is desired, in which notice would be unnecessary. (*s*)

Another instance of irregularity is the omission to examine witnesses, or an examination of them when the parties were not present, and their absence was for good cause, (*t*) or if either of the parties had concealed material circumstances, for this would be fraud. So if the arbitrators, in case of dis-

formed him that the referees had agreed to hear the parties in the afternoon of that day. D. told G. that he could not attend to the business on that day; and G. told D. that H. and I. could not attend at any other time, and that other referees would have to be appointed in their place, to which D. made no objection or reply. On the next day, G. gave notice to D. that the hearing would be on the 27th of March, at a certain place. On the said 27th of March H. and I. were not present at the appointed place, and B., at the request of C. and G., appointed K. and L. as referees in their stead. G., K. and L. thereupon proceeded to hear C., in the absence of D., and made an award in C.'s favor. *Held*, that D. was not bound by the award.

(*r*) Elmendorf *v.* Harris, 23 Wend. 628; Peters *v.* Newkirk, 6 Cowen, 103.

(*s*) Miller *v.* Kennedy, 3 Rand. 2. Notice to sureties on the submission bond is not necessary. Farmer *v.* Stewart, 2 N. H. R. 97. In Ranney *v.* Edwards, 17 Conn. 309, A. and B. having unsettled accounts between them, submitted such accounts to the arbitrament of C. and D.; and in case they should not agree, they were authorized to select a third person, who, either individually, or in conjunction with the other two, should determine the cause. C. and D., after hearing the parties, and examining their books and accounts, were unable to agree upon a part of the matters in controversy; and thereupon they selected E. as a third person to act with them in making the award. C. and D. then stated to E. the claims, accounts and evidence of the parties, relative to the matters about which they disagreed; after which C., D. and E. made their award in favor of B. A. and B. had no notice of the appointment of E., until after the publication of the award; nor had they, or either of them, any hearing before the arbitrators, after such appointment; but C. and D. in omitting to give such notice, and in making their statement to E., acted under a sense of duty, and were not guilty of any fraud, concealment, or partiality. On a bill in chancery, brought by A. against B., to have the award set aside, it was *held*, *Church*, J., dissenting, that no sufficient cause was shown for such an interference, and the bill was dismissed. And *semble* that where the submission is to two arbitrators, with power, in case of disagreement, to select a third person to act conjointly with them, the necessity of a re-hearing, in the absence of any express request by one or both of the parties, is a matter resting in the sound discretion of the arbitrators; but if such request be made, it is their duty to comply with it. See further, Rigden *v.* Martin, 6 H. & J. 406; Emery *v.* Owings, 7 Gill, 488; Bullitt *v.* Musgrave, 3 Gill, 31; Cobb *v.* Wood, 32 Maine, 455; McKinney *v.* Page, Id. 513. And the right to notice may be waived. Graham *v.* Graham, 9 Barr. 254; Harding *v.* Wallace, 10 B. Monroe, 536.

(*t*) So an examination of the books of one party in the absence of, and without notice to the other party, and without proof of the correctness of the entries therein, will vitiate the award. Emery *v.* Owings, 7 Gill, 488.

agreement, were authorized to choose an umpire, but drew lots which of them should choose him. (*u*) But it was in one case held enough that each arbitrator named an umpire, and lots were drawn to decide which of these two should be taken, because it might be considered that both of these men were agreed upon. (*v*) And if an umpire be appointed by lot, or otherwise irregularly, if the parties agree to the appointment, and confirm it expressly, or impliedly by attending before him, with a full knowledge of the manner of the appointment, this, it seems, covers the irregularity. (*w*)

SECTION VII.

OF A RELEASE.

A release is a good defence; whether it be made by the creditor himself, or result from the operation of law. (*x*) No special form of words is necessary, if it declare with entire distinctness the purpose of the creditor to discharge the debt and the debtor. And if it have necessarily this effect, although the purpose is not declared, it will operate as a release; as in case of a covenant never to sue, (*y*) or not to sue without any limitation of time; (*z*) whereas if a covenant not to sue for a certain time be broken by an action,

(*u*) Harris *v.* Mitchel, 2 Vern. 485.

(*v*) Neale *v.* Ledger, 16 East, 51. But see *contra In re* Casell, 9 B. & C. 624; Tunno *v.* Bird, 5 B. & Ad. 488; James *v.* Attwood, 7 Scott, 841; Ford *v.* Jones, 3 B. & Ad. 248.

(*w*) Taylor *v.* Backhouse, 2 Eng. Law & Eq. R. 184; Tunno *v.* Bird, 5 B. & Ad. 488. The acquiescence in such a mode of appointment, will not bind a party however, unless made with full knowledge of all the facts. Wells *v.* Cooke, 2 B. & Ald. 218; Jamieson, *In re*, 4 Ad. & Ell. 945; Greenwood, *In re*, 9 Ad. & Ell. 699; Hodson, *In re*, 7 Dowl. 569. The case of Ford *v.* Jones, 3 B. & Ad. 248, holding that the appointment of an umpire by lot, even by consent of parties, is bad, is probably not law; *consensus tollit errorem*. See Christman *v.* Moran, 9 Barr, 487.

(*x*) A release under seal is a good discharge of a judgment. The party is not driven to an *audita querela*. The rule that a discharge of a contract must be of as high a nature as the contract itself, does not apply to such cases. Barker *v.* St. Quintin, 12 M. W. 441; Co. Litt. 291 *a.*; Shep. Touch. Preston's Ed. p. 322, 323.

(*y*) Cuyler *v.* Cuyler, 2 Johns. 186; Deux *v.* Jefferies, Cro. Eliz. 352; 2 Wms. Saund. 47 s, n. (1); Bac. Abr. tit. Release, (A) 2; Jackson *v.* Stackhouse, 1 Cow. 122. And see White *v.* Dingley, 4 Mass. 433; Sewall *v.* Sparrow, 16 Mass. 24; Reed *v.* Shaw, 1 Blackf. 245; Garnett *v.* Macon, 6 Call, 308.

(*z*) Clark *v.* Russel, 3 Watts, 213; Hamaker *v.* Eberly, 2 Binn. 510.

the covenant is no bar, and the covenantee has no remedy but on the covenant. (*a*) By some courts this last rule is held not to apply to actions of assumpsit, a covenant not to sue for a time certain, being there a bar during that time. (*b*) So if the covenant not to sue for a time, gives a forfeiture in case of breach, it is said to be a bar. (*c*) And a bond or covenant to save harmless and indemnify the debtor against his debt, is a release of the debt. (*d*)

A release, strictly speaking, can operate only on a present right, because one can give only what he has, and can only promise to give what he may have in future. But where one is now possessed of a distinct right, which is to come into effect and operation hereafter, a release in words of the present, may discharge this right. (*e*)

The whole of a release, as of all legal instruments, must be considered; and if it be general in its terms, it may be controlled and limited in its effects by the limitation in the

(*a*) Thimbleby *v.* Barron, 3 M. & W. 210; Dow *v.* Tuttle, 4 Mass. 414; Chandler *v.* Herrick, 19 Johns. 129; Berry *v.* Bates, 2 Blackf. 118; Aloff *v.* Scrimshaw, 2 Salk. 573; 5 Bac. Abr. tit. Release (A.) 2; Hoffman *v.* Brown, 1 Halst. 429; Deux *v.* Jefferies, Cro. Eliz. 352; Perkins *v.* Gilman, 8 Pick. 229; Gibson *v.* Gibson, 15 Mass. 112; Fullam *v.* Valentine, 11 Pick. 159; Winans *v.* Huston, 6 Wend. 471. See Pearl *v.* Wells, 6 Wend. 291; Guard *v.* Whiteside, 13 Ill. 7. And where two are jointly and severally bound, a covenant not to sue one, does not amount to a release of the other. Lacy *v.* Kynaston, 12 Mod. 548, 551; Ward *v.* Johnson, 6 Munf. 6; Tuckerman *v.* Newhall, 17 Mass. 581; Hutton *v.* Eyre, 6 Taunt. 289. And see *ante*, vol. I, p. 24, n. (*p*).

(*b*) Clopper *v.* Union Bank, 7 H. & J. 92. *Sed quære.* And see Dow *v.* Tuttle, 4 Mass. 414, and cases *supra*.

(*c*) 21 H. 7, 30, pl. 10; White *v.* Dingley, 4 Mass. 433. And see Rol. Abr. tit. Extinguishment, (L), pl. 2; Lee *v.* Wood, J. Bridg. 117; Pearl *v.* Wells, 6 Wend. 295.

(*d*) Clark *v.* Bush, 3 Cowen, 151.

(*e*) Pierce *v.* Parker, 4 Met. 80, where the authorities on this subject are critically examined by *Hubbard*, J., who thus remarks:—"From the best examination I have been able to give to the question before us, I come to this conclusion, that while a possibility merely is not the subject of a release, yet that in all cases where there is an existing obligation or contract between parties, although such obligation or contract is executory and dependent also upon contingencies that may never happen, still, if the party in whose favor such obligation or contract is made, or who is liable, by force of it, to suffer damage if it is not performed by the other when the contingency happens, shall execute a release of all claims and demands, actions and causes of action, &c., correct in point of form, and having at the time of executing the release such obligation or contract in view, as one of the subjects upon which the release shall operate, then such release shall be held as a good and valid bar to any suit which may be afterwards brought upon such obligation or contract, or for money had, received, or paid, upon the future happening of the contingency, in consequence of which the plaintiff sustains damage, and but for such release would have had a perfect right of action."

recital. (*f*) And it may expressly extend to only a part of a claim or debt. (*g*) But if a plaintiff is met by a general release under his seal to the defendant, he cannot set up an exception by parol. (*h*) And where the release is general it can not be limited or qualified by extrinsic evidence, although a receipt may be. (*i*)

A release of a debt should be made by him who has a legal interest in it; and if made by one who has not such an interest, but is beneficially interested, and is not the plaintiff of record, though this may for many purposes release the debt, it has been held that it cannot defeat the action at

(*f*) In Rich *v.* Lord, 18 Pick. 325, *Shaw*, C. J., said, "It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent, every part of the instrument is to be considered. As where general words of release are immediately connected with a proviso restraining their operation. Solly *v.* Forbes, 2 Brod. & Bing. 38. So a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties. Payler *v.* Homersham, 4 Maule & Selw. 423. So where it is recited that various controversies are subsisting between the parties, and actions pending, and that it had been agreed that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was *held*, that though general in terms, the releases were qualified by the recital and limited to actions pending. Simons *v.* Johnson, 3 Barn. & Adolph. 175; Jackson *v.* Stackhouse, 1 Cowen, 126. So it has been held in Massachusetts, that where upon the receipt of a proportionate share of a legacy given to another, the person executed a release of all demands under the will, it was held not to apply to another and distinct legacy to the person himself. Lyman *v.* Clark, 9 Mass. R. 235." And see Learned *v.* Bellows, 8 Verm. 79. See also *ante*, pp. 13, 14, and notes.

(*g*) 2 Rol. Abr. 413, tit. release, (H), pl. 1.

(*h*) Brooks *v.* Stuart, 9 Ad. & El. 854. This was assumpsit by indorsees against the maker of a promissory note. Plea, that the promise was a joint and several one by defendant and A., to whom one of the plaintiffs executed a release under seal. Replication, that the release was executed at the request of defendant, who afterwards, and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to plaintiffs for the amount of the note. *Held*, bad, because it set up a parol exception to a release under seal. And see *ante*, vol. 1, p. 23, and n. (*l*).

(*i*) Baker *v.* Dewey, 1 B. & C. 704. But an agreement under seal, which compromises a suit, does not prevent either party from setting up and proving a parol undertaking, that one of the parties should pay the costs that had accrued. Such an undertaking does not contradict or vary the written agreement, but is distinct and independent of it. Morancy *v.* Quarles, 1 McLean, 194. That a simple receipt may be contradicted or varied by extrinsic evidence, see *ante*, p. 67, and notes.

law. (*j*) If the release be made by the trustee, or other party having the legal interest, it can be set aside if to the prejudice of the party beneficially interested, and made without his assent. (*k*)

The release may be only by operation of law; but this also is grounded upon the presumed intent of the parties. Thus, at common law, (varied by statutory provisions,) a creditor who appoints his debtor his executor, cancels the debt; (*l*) unless the debtor refuses to accept the office; this he may do, and then he does not accept the release. (*m*) So if the parties intermarry. (*n*) Or if the creditor receive from the debtor a higher security, as a bond for a simple contract debt; but the higher security may be given only as collateral to the original debt, which then remains in full force. (*o*) Nor will a specialty security extinguish a simple contract debt, unless it be coëxtensive therewith. (*p*)

(*j*) Quick *v.* Ludborrow, 3 Bulst. 29, where A. covenanted with B. that C. should pay B. and D. a certain sum per year, as an annuity. D. married, and her husband released the payment. This was held no bar to the action by B. to enforce the covenant. And see Walmesley *v.* Cooper, 11 Ad. & El. 216, where A. covenanted with B. not to sue him for any debt due from B. to A. *Held*, no bar to an action against B. by A. and C., for a debt due them.

(*k*) See *ante*, vol. 1, p. 22 and notes, and *ante*, p. 129, n. (*t*). And see further, Jones *v.* Herbert, 7 Taunt, 421; Furnival *v.* Weston, 7 J. B. Moore, 356; Arton *v.* Booth, 4 J. B. Moore, 192; Herbert *v.* Pigott, 2 Cr. & Mees. 384; Crook *v.* Stephen, 5 Bing. N. C. 688; Eastman *v.* Wright, 6 Pick. 323; Loring *v.* Brackett, 3 Pick. 403.

(*l*) Cheetham *v.* Ward, 1 B. & P. 630. And see 20 Edw. IV., 17, pl. 2; 21 Edw. IV., 3, pl. 4; Woodward *v.* Darcy, Plowd. 184; Wankford *v.* Wankford, 1 Salk. 299; Co. Litt. 264 b, n. (1); Dorchester *v.* Webb, Sir W. Jones, 345; Rawlinson *v.* Shaw, 3 T. R. 557; Freakley *v.* Fox, 9 B. & C. 136; Allin *v.* Shadburne, 1 Dana, 68. But see *contra* in this country, Winship *v.* Bass, 12 Mass. 199. And see Ritchie *v.* Williams, 11 Mass. 50; Kinney *v.* Ensign, 18 Pick. 232; Stevens *v.* Gaylord, 11 Mass. 267; Ipswich Man. Co. *v.* Story, 5 Met. 313; Pusey *v.* Clemson, 9 S. & R. 204.

(*m*) Dorchester *v.* Webb, Sir W. Jones, 345. And see cases cited in preceding note.

(*n*) Cage *v.* Acton, 1 Ld. Raym. 515; Cannel *v.* Buckle, 2 P. Wms. 242; Smith *v.* Stafford, Noy, 26, Hob. 216. But a bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. And if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good, for they are consistent with the bond and condition. Milbourn *v.* Ewart, 5 T. R. 381.

(*o*) Twopenny *v.* Young, 3 B. & C. 208; Drake *v.* Mitchell, 3 East, 251; Solly *v.* Forbes, 2 B. & B. 38.

(*p*) Jones *v.* Johnson, 3 W. & S. 276. And see Twopenny *v.* Young, 3 B. & C. 208.

SECTION VIII.

OF ALTERATION.

An alteration of a contract is said to operate a discharge of it. If the alteration be by a stranger, it avoids an instrument if it be material, and the original words cannot be certainly restored, on the ground that it is no longer the instrument of the parties. (*q*) If the alteration be made by a

(*q*) Formerly a material alteration by a stranger was held to render the instrument void, notwithstanding the original words might be restored. Thus, in Pigot's Case, 11 Rep. 27, it was resolved that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void: as if a bond is to be made to the sheriff for appearance, &c., and in the bond the sheriff's name is omitted, and after the delivery thereof, his name is interlined, either by the obligee or a stranger, without his privity, the deed is void: So if one makes a bond of £10, and after the sealing of it another £10 is added, which makes it £20, the deed is void: so if a bond is rased, by which the first word cannot be seen, or if it is drawn with a pen and ink through the word, although the first word is legible, yet the deed is void, and shall never make an issue, whether it was in any of these cases altered by the obligee himself, or by a stranger without his privity. Markham *v.* Gonaston, Cro. Eliz. 626, is to the same effect. And such is still held to be the law by all the common law courts in England, as appears by the case of Davidson *v.* Cooper, 11 M. & W. 778, 13 id. 343. That was an action of assumpsit on a guarantee. The defendants pleaded that after the guarantee or agreement in writing had been made and signed, and after the defendants had promised as in the declaration mentioned, and after the guarantee had been delivered to the plaintiff, and while it was in his hands, it was, without the knowledge or consent of the defendants, altered in a material particular by some person to the defendants unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendants, so as to make it purport to be sealed by the defendants, and to be the deed of the defendants; by reason of which alteration the said guarantee became void in law. The plaintiff took issue upon this plea, and upon the trial a verdict was found for the defendant. Afterwards, upon a motion to enter judgment for the plaintiff *non obstante veredicto*, on the ground that it was not stated in the plea that the alteration was made by the plaintiff, or with his privity, Lord *Abinger*, in delivering the judgment of the Court of Exchequer, said:—"There is no doubt but that, in the case of a deed, any material alteration, whether made by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made. This was so resolved in Pigot's case, and though it was contended in argument, that the rule has been relaxed in modern times, we are not aware of any authority for such a proposition, when the altered deed is relied on as the foundation of a right sought to be enforced. The case is different, where the deed is produced merely as proof of some right or title created by, or resulting from, its *having been executed;* as in the case of an ejectment to recover lands which have been conveyed by lease and release, or now by release only. There, what the plaintiff is seeking to enforce, is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so

party, it is said so far to avoid the instrument that he can

far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds; and the principles laid down in Pigot's case would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title or other covenants contained in the release, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover. The principle thus recognized in Pigot's case, with respect to deeds, was, in the case of Master *v.* Miller, 4 T. R. 320, and 2 H. Bl. 141, established as to bills of exchange and promissory notes; and the ground on which the decision in that case was put by the court of error was, that in all such instruments a duty arises analogous to the duty arising on deeds. The instrument itself proves the duty, without any further proof to establish it, *ubi eadem est ratio, eadem est lex*. The law having been long settled as to deeds, was held to be also applicable to these mercantile instruments, which though not under seal, yet possess properties, the existence of which in the case of deeds was, it must be presumed, the foundation of the rule. But the decisions do not stop there. In Powell *v.* Divett, 15 East, 29, the Court of King's Bench extended the doctrine to the case of bought and sold notes, holding, that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his (the vendor's) benefit, thereby lost all title to recover against the vendee. The ground on which the court proceeded was, that the bought note, having been fraudulently altered by the plaintiff, could not be received in evidence for any purpose, and as no other evidence was admissible, the plaintiff had no means of asserting any claim whatever. The court considered that Master *v.* Miller expressly decided the point before them, and Mr. Justice *Le Blanc*, taking, it should seem, his view of that case, not from the judges in the Exchequer Chamber, but from the wider line of argument adopted by Lord *Kenyon* in the court below, expressly stated that Master *v.* Miller was not confined to negotiable securities. Now, the case of Powell *v.* Divett was decided more than thirty years ago, and has ever since been treated as law; and therefore, although we certainly feel that there are difficulties in the extent to which it carries the doctrine of Pigot's case, yet we do not feel it open to us, if we were inclined to do so, to act against that authority; and the only question therefore is, whether there is any real distinction in principle between this case and that of Powell *v.* Divett. The only difference is, that in Powell *v.* Divett, the alteration was made by the plaintiffs, who held the written instrument; whereas, in this case, it is not ascertained by whom the alteration was made; the jury finding that the alteration was made by some person to them unknown, whilst the document was in the hands of the plaintiff. After much reflection, we are of opinion that this does not create any real distinction between the two cases. The case of Powell *v.* Divett was decided on the ground that written instruments, constituting the evidence of contracts, are within the doctrine laid down in Master *v.* Miller, as applicable to negotiable securities; and the doctrine established in Master *v.* Miller was, that negotiable securities are to be considered no less than deeds, within the principle of the law laid down in Pigot's case. That law is, that a material alteration in a deed, whether made by a party or a stranger, is fatal to its validity; and applying that principle to the present case, it is plain that there is no real difference between this case and that of Powell *v.* Divett. . . . . Considering it, therefore, impossible to distinguish this case from Powell *v.* Divett, we think that the plea affords a good defence to the action, and consequently the rule for judgment *non obstante veredicto* must be discharged." The case was afterwards carried by writ of error to the Exchequer Chamber, where the judgment of the court below was unanimously affirmed. Lord *Denman* in delivering the judgment, said, "After much doubt we think the judgment right. The strictness of the rule

not set it up, even if the alteration be in words not mate-

on this subject, as laid down in Pigot's case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's case has been overruled, is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it." And see Mollett *v.* Wackerbarth, 5 C. B. 181. There seems, however, at one time to have been an inclination on the part of the English courts to relax the rule declared in Pigot's case. Thus, in Henfree *v.* Bromley, 6 East, 309, it was *held* that an award altered by the umpire after it was made up ready for delivery, and notice given to the parties, was not entirely vitiated thereby, but that the original award being still legible, was good, the same as if such alteration had been made by a mere stranger without the privity or consent of the party interested. Lord *Ellenborough*, after observing that the umpire had no authority to make the alteration, said, "still, however, I see no objection to the award for the original sum of £57; for the alteration made by him afterwards was no more than a mere spoliation by a stranger, which would not vacate the award." And again, "I consider the alteration of the award by the umpire, after his authority was at an end, the same as if it had been made by a stranger, by a mere spoliator. And I still read it with the eyes of the law as if it were an award for £57, such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument, than if it had been obliterated or cancelled by accident." The same inference may be drawn from Hutchins *v.* Scott, 2 M. & W. 809. There, by an agreement between the plaintiff and defendant, a house, No. 38, was let to the plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered (it was not proved by whom) by writing 35 instead of 38 on an erasure. The house occupied by the plaintiff under the agreement was in fact No. 35:—*Held*, that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record) to show the terms of the holding. In the course of the argument, *Alderson*, B., interrupted the counsel to say, "It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant." And Lord *Abinger* added, "Suppose the stranger destroyed instead of altering it?" And again Lord *Abinger*, in delivering his opinion said, "No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws:—there is no occasion, however, in the present case, to raise the general question. The old law was, no doubt, much more strict than it has been in modern times. Originally, there could be no such thing as founding upon a deed without making profert of it; and it was but an invention of the pleaders, growing out of a decision of Lord *Mansfield's*, to allege, as an excuse for not making profert, a loss of the deed by time and accident, founded on the presumption to be derived from long possession and enjoyment. I can hardly see how such a course is consistent with the old authorities which say that any alteration, even by a stranger, shall vitiate a deed. If it be so altered as to leave no evidence of what it originally was, that may prevent any party from using it; for if it be altered in a material part by a party taking a benefit under it, that may prevent *him* even from showing what it originally was. Here, however, it is sufficient to decide that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35." So Pigot's case has been overruled by the Irish courts. Swiney *v.* Barry,

rial. (*r*) But such a rule would now be applied, if at all, with great relaxation. If the alteration does not vary the meaning of the instrument, or does not affect its operation, there is no good reason why it should make the instrument void. (*s*) The reason given by Lord *Kenyon*, that "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected," (*t*) is neither very clear nor very strong, nor does it apply to an immaterial alteration. We may therefore say, that in this country generally, no immaterial alteration would avoid an instrument. And that alteration which only does what the law would do, that is, only expresses what the law implies, is not a material alteration, and therefore would not avoid an instrument. (*u*) Whether the alteration is

1 Jones, 109, where it was held that an alteration in a material part of a deed by a stranger does not avoid the deed; and the court will look at the deed as it was before it was altered; and, therefore, if upon oyer, the deed is set out as it was before it was altered, it is no variance. And in this country it is clearly settled that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the instrument was before it was altered. Nichols *v.* Johnson, 10 Conn. 192; Rees *v.* Overbaugh, 6 Cow. 746; Lewis *v.* Payn, 8 Cow. 71; Medlin *v.* Platte County, 8 Missouri, 235; Davis *v.* Carlisle, 6 Ala. 707; Waring *v.* Smith, 2 Barb. Ch. 119; Smith *v.* McGowan, 3 Barb. 404; Jackson *v.* Malin, 15 Johns. 293.

(*r*) Pigot's case, 11 Rep. 27; Lewis *v.* Payn, 8 Cow. 71; Den d. Wright *v.* Wright, 2 Halst. 175. And see Mollett *v.* Wackerbarth, 5 C. B. 181. But in Pequawket Bridge *v.* Mathes, 8 N. H. R. 138, it was held that an immaterial alteration of a bond, though made by the obligee, would not destroy the bond. And see to the same effect, Bowers *v.* Jewell, 2 N. H. R. 543; Nichols *v.* Johnson, 10 Conn. 192.

(*s*) Such seems to have been the opinion of the court in Falmouth *v.* Roberts, 9 M. & W. 469. And it was expressly so held in Smith *v.* Crooker, 5 Mass. 540, where the name of the obligor of a bond, was inserted in the *body* of the instrument by the obligee, after it was signed. See also Hunt *v.* Adams, 6 Mass. 519, as to supplying words omitted by mistake, or which the law itself would supply. In Granite Railway Co. *v.* Bacon, 15 Pick. 239, a promissory note in the following words was signed by the defendant: "For value received I promise to pay to Quincy Railway Company" (who were the plaintiffs) "or order, one thousand and thirty dollars, in six months." The note was then indorsed by E. P., and delivered to the treasurer of the plaintiffs, who without the knowledge or consent of the defendant, inserted the words "the order of E. P." above the words "Quincy Railway Company, or order," but without erasing the latter words. It was *held*, that, in the absence of fraud, this was not an alteration affecting the validity of the note. So in Langdon *v.* Paul, 20 Verm. 217, where the plaintiff offered in evidence a sealed instrument, in which the defendant acknowledged that he had "signed" certain promissory notes, and the words "and executed" were interlined after the word "signed," it was held that these words were immaterial, and that no explanation of the time when the interlineation was made was necessary. See also cases cited in preceding note.

(*t*) Master *v.* Miller, 4 T. R. 329.

(*u*) The sensible rule on this subject seems to have been arrived at in Adams *v.* Frye, 3 Met. 103, where it was held that if after the execution and delivery of an unattested bond, the obligee, without

material, is not a question of fact for a jury, but of law for the court; (*v*) and the burden of proof of an alteration rests on the party alleging it. (*w*)

If the alteration be by tearing off a seal, the instrument cannot, in strict law, be pleaded with a profert, but the facts should be specially set forth as the reason why there is no profert. (*x*) If a seal be added to an instrument, this has been held to be a material alteration; (*y*) but we think it would generally be regarded as immaterial and inoperative. It has

the knowledge and assent of the obligor, fraudently, and with a view to some improper advantage, procures a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, the bond is thereby avoided and the obligor discharged. The act of an obligee in procuring a person who was not present at the execution of the bond, nor duly authorized to attest its execution, to sign his name thereto as an attesting witness, is *primâ facie*, sufficient to authorize the jury to infer a fraudulent intent. But it is competent for the obligee to rebut such inference; and if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration. And *Dewey*, J., said, "There was, by the alteration which was made in the case at bar, a material change introduced as to the nature and kind of evidence which might be relied upon to prove the facts necessary to substantiate the plaintiff's case in a court of law. By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same, by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness; and yet the attestation might be wholly unauthorized and fraudulent. It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication that the subsequent addition of the name of an attesting witness, without the privity or consent of the obligee, is not a material alteration of the instrument, and would under no circumstances affect its validity. But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration, like that which was made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed assent of the obligor; it should not operate to avoid the obligation. But on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should lose wholly the right to enforce his original contract in a court of law." See also Thornton *v.* Appleton, 29 Maine, 298.

(*v*) Hill *v.* Calvin, 4 How. (Miss.) 231; Bowers *v.* Jewell, 2 N. H. R. 543; Martindale *v.* Follet, 1 N. H. R. 95, when the insertion of the word *young* in a note for "merchantable neat stock" was held material; Wheelock *v.* Freeman, 13 Pick. 165; Brackett *v.* Mountfort, 2 Fairf. 115, where a note was attested some time after it was signed, and it was held that this rendered the note void. But whether the alteration was made with fradulent motives, or with consent, is for the jury. Bowers *v.* Jewell, 2 N. H. R. 543.

(*w*) Davis *v.* Jenny, 1 Met. 221.

(*x*) Powers *v.* Ware, 2 Pick. 451.

(*y*) Davidson *v.* Cooper, 11 M. & W. 778, 13 id. 343.

indeed been held, that when a seal adds no actual strength to the contract, and interferes with the intention of the parties, which is adequately expressed and effected by the instrument regarded as a simple contract, then the seal may be treated as mere surplusage. (*z*)

In the absence of explanation, evident alteration of any instrument is generally presumed to have been made after the execution of it; and consequently it must be explained by the party who relies on the instrument, or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others of perhaps equal weight hold that there is no such presumption; or, at least, that the question whether the instrument was written as it now stands before it was executed, or has since been altered, and whether if so altered it was done with or without the authority or consent of the other party, are questions which should go to a jury, to be determined according to all the evidence in the case. (*a*)

(*z*) Truett *v.* Wainwright, 4 Gilm. 411.

(*a*) It seems to have been the rule of the common law, that if an obvious alteration, or interlineation appeared in a *deed*, it would, nevertheless, in the absence of any opposing testimony, be presumed to have been made before the deed was finally executed, because the law will never presume fraud or forgery in any person; *omnia presumunter rite esse acta.* Co. Litt. 225. b, n. (1); Trowel *v.* Castle. 1 Keble. 22; Den *v.* Farlee, 1 N. Jer. 280, the alteration being *against* the party claiming under the paper; so is Pullen *v.* Shaw, 3 Dev. 238. And the same rule has been adhered to in a late English case. Doe *d.* Tatham *v.* Catamore, 5 Eng. Law & Eq. R. 349. And in some cases the same principle has been followed in bills of exchange and promissory notes. Gooch *v.* Bryant, 13 Maine, 386, which was an action on a note, the date of which obviously had been at some time materially altered, but when, there was no evidence on either side. The judge before whom the case was tried, ruled, that altering it after the execution would be a fraud which was not to be presumed, but must be proved, and the plaintiff had a verdict. On exceptions this ruling was sustained, *Weston*, C. J., saying,—"There was no other evidence of the alteration of the note, than what arose from inspection, from which it appeared that one of the figures in the date had been altered. Of the fact there could be no doubt; but the more important inquiry was, when it was done. If altered after the signing and delivery, it would vitiate the note; if before, it would not. As to the time, no evidence was offered by either party. The alteration was not in itself proof that it was done after the signature; it might have been made before. If the alteration was *primâ facie* evidence that it was done after, it must be upon the ground that such is the presumption of law. But we do not so understand it. It would be a harsh construction; exposing the holder of a note, the date of which had been so altered as to accelerate payment, or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be at least an equal probability of innocence. But such cannot be the law; it is a question of evidence, to be submitted to the jury, as was done in the case before us. And they were properly instructed, that it

If there are blanks left in a deed, affecting its meaning and operation in a material way, and they are filled up after exe-

was a case not within the statute of limitations." Beaman *v.* Russell, 20 Verm. 205, adopts the same rule. That also was a case of an alteration in the date of a note, and the subject is there ably examined. Cumberland Bank *v.* Hall, 1 Halst. 215, is the same way. In Wickes *v.* Caulk, 5 Harris & J. 36, the names of the witnesses to a deed had been erased. The court refused to presume that the erasure was after execution, saying,—"By the inspection of the original deed, the names of the two persons are written in the place where attesting witnesses generally write their names, and the names are erased, but when they were erased, whether before or after the execution of the deed, does not appear; and it is incumbent on the party who wishes to avoid a deed by its erasure, to prove that the alteration was made after its execution and delivery. Attesting witnesses are not necessary to the validity of a deed, and the erasure of their names, by a stranger, would not avoid it. As the court therefore were not bound to presume that the erasure was made by the grantee, or those claiming under him, after the execution and delivery of the deed, the lessor of the plaintiff could not call on the court to declare the deed inoperative." In Clark *v.* Rogers, 2 Greenl. 147, it is said that in such cases "fraud and forgery are not to be presumed." On the other hand there are many able and well considered decisions to the effect that it is incumbent upon a party offering an instrument which has an obvious or admitted interlineation or alteration on it, which is material, to explain such alteration, and show that it was made before execution. Not the least of these cases is that of Wilde *v.* Armsby, 6 Cush. 314. There, in an action on a written guarantee of the payments of George Winchester and company, it appeared, on the face of the instrument, the signature to which was admitted, that the same had been altered by an interlineation of the words "and company," written in a different handwriting from that of the rest of the instrument, and in a different ink. It was *held*, that the burden of proof was on the plaintiff to show, that the interlineation was made before the instrument was executed. But the court there said,—"We are not prepared to decide that a material alteration, manifest on the face of the instrument, is, in all cases whatsoever, such a suspicious circumstance as throws the burden of proof on the party claiming under the instrument. The effect of such a rule of law would be, that if no evidence is given by a party claiming under such an instrument, the issue must always be found against him, this being the meaning of the 'burden of proof.' 1 Curtcis, 640. But we are of opinion, upon the authorities, English and American, and upon principle, that the burden of proof, in explanation of the instrument in suit in this case, was on the plaintiff. It was admitted by his counsel, at the argument, that the words 'and Co.' which were interlined in the guarantee, were in a different handwriting from that of the rest of the instrument, and also in different ink. In such a case, the burden of explanation ought to be on the plaintiff; for such an alteration certainly throws suspicion on the instrument." Probably the weight of authority in America is, that in *negotiable* instruments, the burden of showing that an obvious and material alteration was lawfully made is upon the party claiming under it. Simpson *v.* Stackhouse, 9 Barr. 186; Hills *v.* Barnes, 11 N. H. R. 395; McMicken *v.* Beauchamp, 2 Louis. R. 290; Warren *v.* Layton, 3 Harrington, 404; Commercial Bank *v.* Lum, 7 How. (Miss.) 414; Wilson *v.* Henderson, 9 Smedes & Marsh. 375; Humphreys *v.* Guillow, 13 N. H. R. 385; Walters *v.* Short, 5 Gilman, 252; Tillou *v.* Clinton Mut. F. Ins. Co. 7 Barb. 564. And in England the current of authority is unbroken that in negotiable instruments a different rule prevails from that applicable to deeds. Any alteration in the former must be explained. Ld. *Campbell*, C. J., in Doe d. Tatham *v.* Catamore, *supra;* Johnson *v.* Marlborough, 2 Stark, 313; Bishop *v.* Chambre, 3 C. & P. 55; Taylor *v.* Mosely, 6 C. & P. 273; Sibley *v.* Fisher, 7 Ad. & El. 444; Knight *v.* Clements, 8 Ad. & El. 215; Clifford *v.* Parker, 2 Mann. & Gr. 909; Henman *v.* Dickinson, 5 Bing. 183; Cariss *v.* Tattersall, 2 Mann. & Gr. 890; Whit-

cution, there should be a re-execution, and a new acknowledgment. (*b*) But no alteration in a deed defeats an estate or interest granted by it, if the estate or interest have vested; for in that case, "the moment after its execution the deed becomes valueless, so far as it relates to the passing of the estate, except as affording evidence that it was executed." (*c*)

field *v.* Collingwood, 1 Car. & Ker. 325. Some American authorities deny any distinction between deeds and other writings, and hold the burden to be always on the party claiming under an instrument to explain any alteration in it. See Morris *v.* Vanderen, 1 Dallas. 67; Prevost *v.* Gratz, Pet. C. C. 369; Jackson d. Gibbs *v.* Osborn, 2 Wend. 555; Acker *v.* Ledyard, 8 Barbour, 514; Jackson *v.* Jacoby, 9 Cowen, 125. In England may be found many decisions to the effect that alterations apparent in a will, will be presumed to have been made *after* the original execution. But this seems to be based upon the construction of the Statute of Wills, 1 Vict., c. 26. See Doe d. Shalleross *v.* Palmer, 6 Eng. Law & Eq. R. 155; Cooper *v.* Bockett, 4 Moore, P. C. 419; Burgoyne *v.* Showler, 1 Rob. Ecc. R. 5. In Rankin *v.* Blackwell, 2 Johns. cases, 198, the maker of a note relied upon an alteration in the date and amount, as a defence. His proof was (*inter alia*) the alterations apparent on the note itself, from which the jury might decide whether the note had been altered or not; but the judge overruled the evidence offered, and charged the jury that the mere appearance of alterations on the face of the note, unaided by any proof as to the character of the persons through whose hands it had passed, was not sufficient to support the defence set up. The jury, accordingly, found a verdict for the plaintiff, for the full amount on the face of the note, with interest. The verdict was set aside because other competent evidence was not admitted, but the court observed,—"The alterations on the face of the note, unsupported by other proof, would not be competent evidence; but if any previous testimony had been offered, to show that the note was given for a less sum, or to render it probable that a fraud had been committed, the alteration on the face of the note would have been a strong corroborating circumstance, if not decisive, of the truth of the fact. On the first ground, we think, that there ought to be a new trial, with costs, to abide the event of the suit." In Bailey *v.* Taylor, 11 Conn. 531, the whole reasoning of the court is against the principle, that a party claiming under an instrument, which has been obviously altered, must necessarily, and in all cases, explain such alteration before he can recover upon the paper. And see Matthews *v.* Coalter, 9 Missouri, 705; North River Meadow Co. *v.* Shrewsbury Church, 2 New Jersey, 424.

(*b*) Hibblewhite *v.* McMorine, 6 M. & W. 200. But see upon this point, Smith *v.* Crooker, 5 Mass. 538; Wiley *v.* Moor, 17 S. & R. 438; Duncan *v.* Hodges, 4 McCord, 239; Stone *v.* Wilson, Id. 203; Fulton's case, 7 Cow. 484; Bank *v.* Curry, 2 Dana, 142; Jordan *v.* Neilson, 2 Wash, 164; Boardman *v.* Gore, 1 Stew. 517; Bank *v.* McChord, 4 Dana, 191.

(*c*) Per Lord *Abinger*, in Davidson *v.* Cooper, 11 M. & W. 800. So in Chessman *v.* Whittemore, 23 Pick. 231, it was *held* that where the title to real estate under a deed, has once vested in the grantee by transmutation of possession, it will not be divested or invalidated by a subsequent material alteration of the deed. And *Morton*, J., said: — "There is a manifest distinction between executory contracts and conveyances of property. When deeds of conveyance of real, or bills of sale of personal property are completed, and possession delivered under them, so far as the change of ownership depends on them they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them, remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his

But even in that case, if the party in possession of the land under the deed, is suing the grantor upon any of his covenants contained in the deed, an alteration of the deed, subsequent to the execution, would have the same effect as if made in any other instrument. (*d*)

SECTION IX.

OF THE PENDENCY OF ANOTHER SUIT.

Any one who has a claim against another is at liberty to prosecute this claim at law, and the whole system of legal procedure exists for the purpose of making effectual his endeavors to recover the debt, if it be just and legal. But no man can do more than is necessary for this purpose, or use the machinery of the law merely to vex and distress another. Hence, as the law presumes that any one question may be tried and determined by means of one action, no claimant may bring more than one at the same time. Therefore, it is a good cause of abatement of an action, that another is then pending for the same cause, and between the same parties. (*e*) But the prior action must be between the same parties; (*f*) and the plaintiff must sue in the same capacity. (*g*) And it has been held that the parties must not only be the same, but must stand in the same relation to each other in both suits. Thus, it has been held that a prior suit by A. against

remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times." And see Barrett *v.* Thorndike, 1 Greenl. R. 73; Withers *v.* Atkinson, 1 Watts, 236; Smith *v.* McGowan, 3 Barb. 404; Bolton *v.* The Bishop of Carlisle, 2 H. Bl. 259. But in Bliss *v.* McIntire, 18 Verm. 466, it was *held*, that if a lessee fraudulently alter his lease in a material part, subsequent to its execution, he thereby destroys all his future right under the lease, either to retain the possession of the premises, or to preclude the lessor from re-entering upon them.

(*d*) Davidson *v.* Cooper, 11 M. & W. 800; Withers *v.* Atkinson, 1 Watts, 236; Chessman *v.* Whittemore, 23 Pick. 231; Waring *v.* Smyth, 2 Barb. Ch. 119.

(*e*) Tracy *v.* Reed, 4 Blackf. 56; McKinsey *v.* Anderson, 4 Dana, 62; James *v.* Dowel, 7 Sm. & Mar. 333.

(*f*) Therefore, in a suit against A. pendency of another suit for the same cause against B. is not a good plea in abatement. Casey *v.* Harrison, 2 Dev. 244; Henry *v.* Goldney, 15 M. & W. 494, overruling whatever is contrary in Boyce *v.* Douglas, 1 Campb. 60. And see Logs of Mahogany, 2 Sumn. 589; Treasurers *v.* Bates, 2 Bail. 362; Davis *v.* Hunt, id. 412; Thomas *v.* Freelon, 17 Verm. 138.

(*g*) Cornelius *v.* Vanarsdallen, 3 Penn. St. 434.

B. cannot be pleaded in abatement of a subsequent suit by B. against A. arising from the same cause. (*h*) In England the prior suit must be in a court not inferior to that in which the second is, in order to be a defence. (*i*) If the prior action be pending in another State, it will not have this effect, (*j*)

(*h*) See Wadleigh *v.* Veazie, 3 Sumn. 165; Colt *v.* Partridge, 7 Met. 570; Haskins *v.* Lombard, 16 Maine, 140. Whether in an action against *two*, a prior action against *one* of them is a good cause of abatement, may not perhaps be fully settled. We are inclined to believe it is. See Earl of Bedford *v.* Bishop of Exeter, Hob. 117; Rawlinson *v.* Oriet, 1 Show. 75, Carth. 96. And *e converso*. Graves *v.* Dale, 1 Monr. 190; Atkinson *v.* The State Bank, 5 Blackf. 84. Though there was a misjoinder of defendants in the first suit. Id.

(*i*) Laughton *v.* Taylor, 6 Mees. & Welsb. 695; Brinsby *v.* Gold, 12 Mod. 204; Sparry's case, 5 Rep. 61 *a.*; Seers *v.* Turner, 2 Ld. Raym. 1102. We are not aware of any such distinction in this country, and if the court where the cause is first brought has jurisdiction to try the case and render a valid judgment therein, we think the pendency of that suit is good cause of abatement to a second suit in another and higher court. See Boswell *v.* Tunnell, 10 Alabama, 958; Johnston *v.* Bower, 4 Hen. & Mun. 487; Thomas *v.* Freelon, 17 Verm. 138; Slyhoof *v.* Flitcraft, 1 Ashmead, 171; Ship Robert Fulton, 1 Paine, 620. But see farther, Smith *v.* The Atlantic M. F. Ins. Co. 2 Fost. 21, cited *infra*, n. (*j*); and Bowne *v.* Joy, 9 Johns. 221.

(*j*) The current of authorities is to the effect that the pendency of an action in a *foreign* tribunal, although of competent jurisdiction, is not good cause of abatement. Story, Confl. of Laws, (Bennett's Ed.) § 610 *a*, and cases cited. See also Ostell *v.* Lepage, 10 Eng. Law & Eq. R. 250, a case in equity; McJilton *v.* Love, 13 Illinois, 486; Bowne *v.* Joy, 9 Johns. 221; Walsh *v.* Durkin, 12 Johns. 99; Russel *v.* Field, Stuart's Lower Canada R. 558; Bayley *v.* Edwards, 3 Swanst. 703; Salmon *v.* Wooton, 9 Dana, 422; Chatzel *v.* Bolton, 3 McCord, 33. And see *ante*, p. 119, n. (*o*). But see *contra*, Balch, *ex parte*, 3 McLean, 221. And see Hart *v.* Granger, 1 Conn. 154. If a plea of such foreign suit ever is good in abatement, it must clearly show the jurisdiction of such foreign court over the subject-matter, and the persons of the parties. Newell *v.* Newton, 10 Pick. 470; Trenton Bank *v.* Wallace, 4 Halst. 83. And see Smith *v.* The Atlantic M. F. Ins. Co., 2 Fost. 21. In this last case the question arose whether the Circuit Court of the United States for the district of New Hampshire was a foreign court *quoad* the state courts of New Hampshire; and it was held that it was not; and therefore that the pendency of another action for the same cause in the former court, if that court had jurisdiction, is a good plea in abatement of an action in the latter courts. *Perley*, J., said,—"The ground is taken for the plaintiff that, as to the courts and government of New Hampshire, the Circuit Court of the United States for this district, is to be regarded as a court of foreign jurisdiction; and for that reason an action pending in the Circuit Court of this district cannot be pleaded in abatement of a subsequent suit brought for the same cause in a court of this State. The judiciary of the United States is a branch of the general government of this country, established by the constitution. The Circuit Court of the United States, within its territorial limit, and as to causes within its jurisdiction, cannot be regarded as a foreign court. Its powers are not derived from any foreign government. Its judgments operate directly to bind persons and property within this State; its process, mesne and final, is effectual to enforce its own orders and judgments. The Circuit Court of another district has no authority within this State, and may be considered territorially and for some purposes as a foreign jurisdiction. The Circuit Court, and the courts of this State, derive their powers from different sources, and for most, if not for all purposes, are independent of each other. But in certain cases they exercise concurrent jurisdiction. The case supposed by the plea in this action, is one of them. The plaintiff had his election to pursue his remedy in the courts

except in the case of a foreign attachment or trustee process. (*k*)

And there is an exception to that part of the rule which requires the parties to be the same, in the case of a *qui tam* action, which may be brought by any informer. There the principle upon which the rule is founded, namely, that the defendant shall not be twice vexed, requires the second suit to abate, although the first were prosecuted by a different person. (*l*)

of this State, or resort to the concurrent jurisdiction of the Circuit Court. The general rule of law forbids that a defendant should be harrassed by two suits for the same cause at the same time. In some cases, where the first suit, from defect of jurisdiction in the court, cannot give adequate remedy, a second action is allowed. This case falls clearly within the reason of the general rule, which prohibits the second suit. No ground has been suggested, and none occurs to us, for supposing that two suits, one in a State court, and the other in the Circuit Court for the same State, are less vexatious and oppressive to the defendants, than two suits in the same court. On the other hand, the plaintiff fails to bring himself within the reason of the excepted cases, where a second action is allowed, because the court in which the first was pending, cannot give complete remedy for want of jurisdiction over the person or property of the defendants. Where the prior suit is in an inferior court of special and limited jurisdiction, incapable of affording the plaintiff the remedy which he needs, the prior will not abate the second, though both courts exercise their jurisdiction in the same country. Sparry's case, 5 Coke, 62 *a*. But the fact that the court in which the prior action is pending is a subordinate jurisdiction, would seem to be no objection to the plea, provided the first action can give adequate and complete remedy. It has been decided in numerous cases that an action pending in a court whose jurisdiction is *territorially* foreign cannot be pleaded in abatement. The reason of this rule would seem to be, not that the authority of the foreign court is questionable within the limits of its jurisdiction, but because the foreign court cannot enforce its orders and judgment beyond its own territory; and, on this account, the remedy of the plaintiff by his prior suit may be incomplete. The defendant may have property which ought to be applied to the payment of the same demand in both jurisdictions; or his property may be in one jurisdiction, and his person in another; and suits for these and other reasons may be necessary in both territorial jurisdictions. It has accordingly been held, that a suit pending in the Circuit Court for another district cannot be pleaded in abatement of a suit in a State court. Walsh *v.* Durkin, 12 Johns. 99. But in this case the plaintiff's remedy was as complete and effectual in the Circuit Court, as he could have in the courts of this State. The mesne process of that court gives security on the person and property of the defendant, at least as effectual as can be had by ours; the trial, if held, would be by jurors of this State; the judgment for the plaintiff would be final and conclusive, and could be executed by the process of that court throughout the State. The plaintiff, therefore, had no more necessity or excuse for his second suit, than he would have had if both had been in the same court. And it has accordingly been held that the judgment of the Circuit Court for the same State, is not to be considered in the State courts as a foreign judgment. Barney *v.* Patterson, 6 Har. & Johns. 203. We are of opinion that the pendency of another action for the same cause, between the same parties, in the Circuit Court of the United States, is sufficient, if well pleaded, to abate a suit in the courts of this State, where the Circuit Court had jurisdiction of the prior cause."

(*k*) See *ante*, p. 119, n. (*n*).

(*l*) See Commonwealth *v.* Churchill, 5 Mass. 174; Commonwealth *v.* Cheney,

SECTION X.

OF FORMER JUDGMENT.

The whole purpose of the law being to settle questions and terminate disputes, it will not permit a question which has been settled to be tried again. (*m*) But it must be the meaning of this rule — for this meaning is required by obvious justice — that only a question which has been settled after a full and regular trial, and which has been the object of direct investigation, and to which parties have had their attention drawn in such wise as to warrant the supposition that a new trial would but repeat a former process, — only a question tried in this way is excluded from further trial. For it would be unjust and dangerous to permit a party to bring up an important question incidentally, and then bind conclusively the other party by the result, although he might well have neglected this question, for this time, in his wish to confine all his attention and all his efforts to what he had a right to deem the true question. The rule therefore may be expressed thus, — that a judgment on the same matter in issue is a

6 Mass. 347. The true spirit of the rule also requires the former suit to have been valid and effectual; otherwise the second suit will not be considered vexatious. Downer *v.* Garland, 21 Verm. 362; Hill *v.* Dunlap, 15 Id. 645; Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Durand *v.* Carrington, 1 Root, 355. The prior suit must also have been actually entered in court, for it must be proved by *the record* to be for the same cause, and pending when the second was commenced. Parker *v.* Colcord, 2 N. H. R. 36; Commonwealth *v.* Churchill, 5 Mass. 174; Trenton Bank *v.* Wallace, 4 Halst. 83; Smith *v.* Atlantic M. F. Ins. Co., 2 Fost. 21. The pendency of a prior suit in which the defendant is summoned as trustee of the plaintiff, is no cause for abatement of a suit subsequently commenced by the plaintiff (the principal defendant in the first action) for the cause of action sought to be reached by the trustee process. Wadleigh *v.* Pillsbury, 14 N. H. R. 373. And see Morton *v.* Webb, 7 Vermont, 123. Neither is a suit at law a defence to a suit in equity. Peak *v.* Bull, 8 B. Monroe, 428. Nor *vice versâ*. Calt *v.* Partridge, 7 Met. 570; Haskins *v.* Lombard, 16 Maine, 140; Blanchard *v.* Stone, 16 Verm. 234; Ralph *v.* Brown, 3 Watts. & Serg. 395.

(*m*) But the party insisting upon a former recovery as a bar to an action, must show that the *record* of the former suit includes the matter alleged to have been determined. Campbell *v.* Butts, 3 Comst. 173. Consequently, where the declaration in the first suit states a particular matter as the ground of action, and issue is taken by the defendant, parol proof is inadmissible to show that a different subject was litigated upon the trial. Id.

conclusive bar. (*n*) But when we come to the meaning of the phrase, "the same matter in issue," and to the applica-

(*n*) The Duchess of Kingston's case, 20 Howell's State Trials, 538, is the leading case on this point. Lord Chief Justice *De Grey* there said:—"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true;—First, that the judgment of a court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, *directly in question* in another court. Secondly, that the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be *inferred by argument from the judgment*." This rule was expressly adopted by *Story*, J., in Harvey *v.* Richards, 2 Gall. 229; and by *Gibson*, C. J., in Hibshman *v.* Dulleban, 4 Watts, 191. See also Wright *v.* Deklyne, 1 Peters, C. C. R. 202; Gardner *v.* Buckbee, 3 Cowen, 120. In this last case, B. sued G. upon a promissory note, in the Marine Court of the city of New York, and G. pleaded the general issue, with notice that the note was given upon the fraudulent sale of a vessel by B. to G., which was the question upon the trial, and the verdict was for the defendant: and afterwards B. sued G. in the Court of Common Pleas for the city and county of New York upon another note given upon the same purchase; *held*, that upon the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud, and were a conclusive bar to the second action; that the proper course was to give the record of the Marine Court in evidence, and then show by parol evidence, (*e. g.*, by the justice who tried the first cause) that the same question had been tried before him. So where B. brought trespass *quare clausum fregit* in May, 1816, laying the trespass with a *continuando* between the 1st November, 1814, and the 24th November, 1815, and recovered: and then brought trespass against the same defendant for a subsequent injury to the premises in question in the former suit; it was *held*, that the record in the former suit, followed by parol evidence that the premises in question were the same in both, was conclusive evidence of the plaintiff's title in the second action; that it operated against the defendant by way of estoppel, whether it was pleaded or given in evidence in the second suit. Burt *v.* Sternburgh, 4 Cowen, 559. See also Outram *v.* Morewood, 3 East, 346; George *v.* Gillespie, 1 Greene, (Iowa) 421. It is not necessary that the plaintiff's claim in both suits be *identical*. If both arise out of the *same transaction*, and the defence is equally applicable to both, the first judgment will be conclusive. Bouchaud *v.* Dias, 3 Denio, 238. In this case H. C. was indebted to the United States for duties, arising upon a single importation, and gave two bonds with the same sureties, payable at different times, for distinct parts of the same debt. One of the sureties having paid both bonds, brought an action in the Superior Court of the city of New York against his co-surety for contribution on account of the money paid upon one of the bonds, and the defendant pleaded a discharge of himself from the whole debt by the secretary of the treasury, pursuant to the act of congress, to which the plaintiff demurred, and judgment was given against him. *Held*, that such judgment was a conclusive bar to a subsequent action in the Supreme Court between the same parties, in which the plaintiff sought to recover contribution on account of the money paid on the other bond. So where A. took from B. a bill of sale of certain personal property, and C. afterwards levied upon the property by virtue of attachments in favor of B.'s creditors, and A. subsequently took and converted to his own use *a part of the property*, for which C. sued him, and recovered judgment in a justice's court, on the ground that the bill of sale was fraudulent and void as to the creditors; it was *held*, that the judgment was conclusive upon the question of fraud, in an action of replevin afterwards brought

tion of the rule, we find an irreconcilable conflict between the authorities. (*o*) Much of the difficulty springs, no doubt, from the relaxation of the rules and practice of pleading; but there are questions on this subject in their own nature difficult, and which can only be determined by farther adjudication. It may be difficult to draw the line, but it is necessary that it should be drawn somewhere. (*p*) Suppose that in an action for assault and battery, in which the general issue is pleaded, the defendant relies upon the "*molliter manus imposuit*," asserting the alleged assault to have taken

by A. against C. in the Supreme Court, to recover the *residue of the property*. Doty *v.* Brown, 4 Comst. 71.

(*o*) This question was examined by *Parker*, C. J., with his accustomed ability, in King *v.* Chace, 15 N. H. R. 9. It was there *held* that by "the matter in issue" is to be understood that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings; that the facts offered in evidence to establish the matter which is in issue are not themselves in issue within the meaning of the rule, although they may be controverted on trial. Thus, where an action of trover is brought, and a deed is offered in evidence to establish the title of the plaintiff, and impeached by the other party as fraudulent, if the jury, in considering the case, are of the opinion that the deed is fraudulent, and they find that the property in question is not the property of the plaintiff, and return a verdict that the defendant is not guilty, the verdict and judgment will not conclude the plaintiff, in another suit, for the recovery of other property included in the same conveyance. Nor can the verdict be used in evidence to impeach the deed in such subsequent suit.

(*p*) It is not essential that the second suit should be in the same *form* as the first, in order that a judgment therein should be a bar. If the *cause of action* is the same in both, the former judgment is conclusive. Thus, a judgment in trover is a bar to a second action of assumpsit for the value of the same goods. Agnew *v.* McElroy, 10 Sm. & Mar. 552; Young *v.* Black, 7 Cranch, 565; Livermore *v.* Herschell, 3 Pick. 33. See Loomis *v.* Green, 7 Greenl. 386. Where the cause of action is the same, a former judgment in a suit between the same parties, though an inadequate one, is a bar to a second recovery. Pinney *v.* Barnes, 17 Conn. 420. In that case an action was brought, in the name of the judge of probate, against a removed executor, on his probate bond, in which action sundry breaches were assigned, and among them, that the defendant had neglected and refused, upon demand made therefor, to pay over to his successor the moneys in his hands belonging to the estate; and thereupon judgment was rendered against the defendant for a certain sum and costs. On a *scire facias* afterwards brought on this judgment, it appeared that the testator had given by his will certain legacies, payable to the legatees respectively when they should become eighteen years of age; that neither at the time of the defendant's removal from office, nor at the trial of, and judgment in, the original action, had these legatees arrived at that age; that the defendant had then in his hands moneys belonging to the estate, derived from a sale of lands under a decree of probate, sufficient to pay such legacies, which he still retained; that on the trial of such action, no claim was made or evidence offered in relation to the non-payment of such legacies, nor were they considered by the court or included in the judgment, the action having been instituted and prosecuted solely for the benefit of those entitled to the *residuum* of the estate after the payment of such legacies. *Held*, *Williams*, C. J., and *Waite*, J., *dissenting*, that the former judgment must be considered as covering the whole ground, and constituting a bar to any claim for the legacies in the *scire facias*, the cause of action in both suits being essentially the same.

place on his own land; this the plaintiff denies, and it is the main or only question actually controverted. Could a judgment in this case be interposed as a bar to a writ of entry for the same land, between the same parties? We think it clear that it could not. But if to trespass *quare clausum*, soil and freehold are pleaded by the defendant, can a judgment in this action be pleaded in bar to a writ of entry? It is more difficult to answer this question, because it differs from the former in the new element, that the title to the very land is put in issue of record, and by the pleadings. And very high authorities answer this question differently. (*q*) Again, if in trover, the question turns upon the validity of

(*q*) Thus, in Arnold *v.* Arnold, 17 Pick. 4, which was a writ of right, the tenant pleaded a judgment in favor of his grantor rendered in an action of trespass *quare clausum* upon an issue joined upon a plea of *liberum tenementum*, and the plea was held to be no bar. And from the opinion delivered, it seems that the judgment upon this plea would have been the same, if it had been interposed as a bar to a writ of entry. And in Mallett *v.* Foxcroft, 1 Story, 474, it was held to be no bar to a writ of right, that there had been a judgment on a petition for partition between the same parties, in favor of the tenant, upon an issue joined therein on the sole seisin of the demandant. But in Dame *v.* Wingate, 12 N. H. 291, it was directly decided that a judgment rendered in an action of trespass *quare clausum* upon an issue joined on a plea of *liberum tenementum*, is a bar to a writ of entry for the same premises. And *Gilchrist*, J., said: — "It is a principle well established in the law, that a former judgment, upon a point directly in issue upon the face of the pleadings, is admissible in evidence against the parties and their privies, in a subsequent suit, where the same point comes in question. Nor is it material that the former suit was trespass, and the latter a writ of entry, if the same point were decided in the former suit. It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having once distinctly been put in issue by them, or by those to whom they are privy, in estate or law, has been on such issue joined, solemnly found against them. *Ellenborough*, C. J., Outram *v.* Morewood, 3 East, 355. The recovery concludes nothing upon the ulterior right of possession, much less of property in the land, unless a question of that kind be raised by a plea and a traverse thereon. Ibid. 357. And a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages founded on the same inquiry, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. Ibid. 354. The issue upon a plea of *liberum tenementum* raises a question of title. Forsaith *v.* Clogston, 3 N. H. Rep. 403." See also Bennett *v.* Holmes, 1 Dev. & Batt. 486. In some States, a judgment in an action of trespass, upon the issue of *liberum tenementum*, has been held admissible in a subsequent action of ejectment between the same parties. See Hoey *v.* Furman, 1 Penn. St. 295; Kerr *v.* Chess, 7 Watts, 371; Foster *v.* McDivit, 9 Id. 341, 349; Meredith *v.* Gilpin, 6 Price, 146. As to the effect of a judgment in ejectment, as regulated by the Revised Statutes of New York, see Beebe *v.* Elliott, 4 Barb. 457.

an instrument under which title to the chattels is claimed, and this is found to be fraudulent and void, is the judgment in this case conclusive as to all questions of property or title between the same parties, under that instrument, and in relation to all the property which the instrument purports to transfer. Here, too, the authorities are directly antagonistic. (*r*)

So far as we can venture to state rules which may determine these difficult questions, we should say that "the matter in issue" is either that which the record and the pleadings show clearly to be so, or else a question which extrinsic evidence shows to have been actually tried, and shows also to have been absolutely essential to the case, in so much that the answer to it decided the case, and if it had not been contested the case could not have been tried. Farther than this we should not be willing to go. And, therefore, we should say that the judgment in the supposed case of trover should not be conclusive upon the questions which might be raised in other cases as to the validity of the instrument, and the title it gave. And we should incline also to the opinion that the judgment in the supposed case of trespass *quare clausum* would be no bar to a writ of entry.

It is said that the former judgment must have been between the same parties; and for this rule there seems to be good reason as well as authority. (*s*) It has also been held the same parties must stand in the same position, as plaintiff and defendant. It is obvious that sometimes this must be necessary to constitute the question the same; and it is only then that the rule can apply. (*t*)

(*r*) See King *v.* Chase, 15 N. H. 9, cited *supra*, n. (*o*), and Doty *v.* Brown, 4 Comst. 71, cited *supra*, n. (*n*).

(*s*) This is not always true; for where a cause of action is such that more than one may sue, a judgment in an action brought by one is a bar to an action by the other. Thus, if a consignor sue a carrier for goods, and the latter has a verdict and judgment on a plea of not guilty, the consignee cannot maintain another action for the same goods. Green *v.* Clark, 5 Denio, 497. So where a plaintiff may bring his action against either of two persons, as for instance against a sheriff or his deputy, for the acts of the deputy, a judgment in favor of either would be a bar to a second action for the *same cause* against the other. See King *v.* Chase, 15 N. H. R. 9. And in Parkhurst *v.* Sumner, 23 Verm. 538, it was *held*, that all matters which might have been urged by the party before the adjudication are concluded by the judgment, as to the principal parties, and all privies in interest, or estate; and among privies are those who are holden as bail for the party.

(*t*) See *ante*, p. 231, 232, and n. (*h*).

It may be added that no prior judgment is a bar to a subsequent action, if it be shown that the judgment was obtained by a mistake on the part of the plaintiff, which prevented him from trying the question; as an error in respect to the character of the action, or a fault in the pleading. (*u*)

SECTION XI.

OF SET-OFF.

Where two parties owe each other debts connected in their origin or by a subsequent agreement, the balance only is the debt, and he to whom it is due should sue only for that; and if he sue for more, the opposite debt may be offered in evidence, reducing the claim of the plaintiff to the balance. But where the opposite debts or accounts are not so connected, each constitutes a distinct debt, for which suit may be brought. But such debts or accounts may be balanced by *setting off* one against the other; at law or in equity. The law of set-off is very much regulated by statute in this country; and we do not propose to dwell upon the special provisions of any of the State statutes. But these generally contain many principles in common, and although, strictly speaking, set-off may not be a part of the common law, (*v*) yet some rules and principles have been established by usage and adjudication.

(*u*) Agnew *v.* McElroy, 10 Sm. & Mar. 552; Johnson *v.* White, 13 Sm. & Mar. 584. The former decision must have been on the merits, or the judgment must be such that it *might have been.* Dixon *v.* Sinclear, 4 Verm. 354; Estill *v.* Yaul, 2 Serg. 467; N. E. Bank *v.* Lewis, 8 Pick. 113; Lane *v.* Harrison, 6 Munf. 573; McDonald *v.* Rainor, 8 Johns. 442; Lampen *v.* Kedgewin, 1 Mod. 207; Knox *v.* Waldoborough, 5 Greenl. 185; Bridge *v.* Sumner, 1 Pick. 371; Mosby *v.* Wall, 23 Mississippi, 81. And where judgment was rendered in replevin against a plaintiff, by nonsuiting him in a case in which he had replevied a vessel alleged to be his by virtue of a bottomry bond, seized by an attaching officer, it was *held*, that that judgment to be good in bar of an action of trover for the vessel must be pleaded and averred, and proved to have been upon the merits and to have been rendered in a suit between privies in interest. Greely *v.* Smith, 3 W. & M. 236.

(*v*) The defence of set-off, strictly so called, is purely the creature of statute. Stat. 2 Geo. 2, c. 22, s. 13, made perpetual by 8 Geo. 2, c. 24, s. 4, and which, with some modifications, has been generally adopted in the United States, (see Meriwether *v.* Bird, 9 Georgia, 594,) provides, "that where there are mutual debts between the plaintiff

The law of set-off is quite similar to the *compensation* of the civil law; (*w*) not as we think because it is borrowed from it, but because both rest on similar principles of common sense and common justice. And although in the details they differ much, the civil-law doctrines can be applied to the law of set-off, not only for general, but sometimes for particular illustration.

Set-off has been well defined, as a mode of defence by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff, to counterbalance it, in whole or in part. (*x*)

A demand founded on a judgment may be set off, or upon a contract, if it could be sued in indebitatus assumpsit, debt, or covenant. (*y*) But if it arise *ex delicto*, and can be sued only in trespass, replevin, or case, it is not in general capable of set-off; (*z*) nor is it if recoverable only by bill in equity. (*a*)

Courts usually permit judgments to be set off against each other, on *motion*, when such set-off is equitable, even if the parties are not the same, (*b*) whether the statute *expressly*

and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue," or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." The object of these statutes was to prevent cross-actions between the same parties. Isberg *v.* Bowden, 22 Eng. Law & Eq. R. 551. Courts of equity have power at common law, independent of any statute, to order a set-off of debts in certain cases. See 2 Story's Eq. Jur. ch. 38.

(*w*) Domat, pt. 1, b. 4, tit. 2, s. 1; 1 Ersk. Ins. b. 3, tit. 4, s. 5; Pothier, Traité des Obligations, pt. 3, ch. 4. It has frequently been said in America, that as the doctrine of set-off was borrowed from the civil law, it should be interpreted by the same principles of construction. See Meriwether *v.* Bird, 9 Georgia, 594; per *Kent*, J., in Carpenter *v.* Butterfield, 3 Johns. Cas. 155.

(*x*) Barbour on Set-off, p. 17.

(*y*) Hutchinson *v.* Sturges, Willes, 261; Howlet *v.* Strickland, Cowper, 56; Dowsland *v.* Thompson, 2 Black. R. 911.

(*z*) Huddersfield Canal Co. *v.* Buckley, 7 T. R. 47; Sapsford *v.* Fletcher, 4 T. R. 512; Bull. N. P. 181; Freeman *v.* Hyett, 1 Black. 394; Dean *v.* Allen, 8 Johns. 390; Gibbes *v.* Mitchell, 2 Bay, 351.

(*a*) Gilchrist *v.* Leonard, 2 Bailey, 135; Sherman *v.* Ballou, 8 Cow. 304.

(*b*) Barker *v.* Braham, 3 Wils. 396; Dennie *v.* Elliott, 2 H. Bl. 587; Schermerhorn *v.* Schermerhorn, 3 Caines, 190; Brewerton *v.* Harris, 1 Johns. 145; Turner *v.* Satterlee, 7 Cow. 481; Story *v.* Patten, 3 Wend. 331; Graves *v.* Woodbury, 4 Hill, 559; Goodenow *v.* Buttrick, 7 Mass. 140; Makepeace *v.* Coates, 8 Mass. 451; Barrett *v.* Barrett, 8 Pick. 342; Gould *v.* Parlin, 7 Greenl. 82; Wright *v.* Cobleigh, 3 Fost. 32. In

allow this or not; but it is a matter within their discretion, (*c*) and is determined by the justice of the case. Therefore it will not be permitted against a *bonâ fide* assignee for value. (*d*) Nor if the defendant is in execution on the judgment, (*e*) for that is, in general, a satisfaction of it. Or if having been imprisoned, he has been discharged by his creditor, even if it was not the intention of the creditor to discharge the debt. (*f*) But if he escapes, or is released from imprisonment under an insolvent act, which does not discharge the debt, the judgment may be set off. (*g*) And, in the exercise of their discretion, courts usually permit the judgments recovered in other courts to be set off. (*h*) And not only the original judgment creditor may so use it, but an absolute assignee for value may make this use of the judgment. (*i*) Nor is it material on what ground of action the judgment was founded. And if the judgment which it is desired to set off can be enforced by him who would so use it, against the party who has the judgment to be satisfied by the set-off, this is sufficient; and therefore it is not necessary that the judgments be in the same rights, or that the parties on the record be the same. (*j*) So costs may be set off, either

this last case it was *held*, 1. That courts of law have power to set off mutual judgments. 2. The set-off is made between the real and equitable owners of the judgment, and not between the nominal parties. 3. If the defendant, against whom a judgment is recovered, is the assignee and equitable owner of an ascertained part of a judgment recovered against the plaintiff, in the name of another person, that part may be set off against the plaintiff's judgment. 4. The application to set-off judgments must be made in the court where the judgment was recovered against the party who makes the application. 5. To authorize a set-off of judgments it is not necessary that either of the suits shall be pending.

(*c*) Burns *v.* Thornburgh, 3 Watts, 78; Tolbert *v.* Harrison, 1 Bailey, 599; Coxe *v.* State Bank, 3 Halst. 172; Scott *v.* Rivers, 1 Stew. & Port. 24; Davidson *v.* Geoghagan, 3 Bibb, 233; Smith *v.* Lowden, 1 Sandf. 696.

(*d*) Makepeace *v.* Coates, 8 Mass. 451; Holmes *v.* Robinson, 4 Ham. 90.

(*e*) Burnaby's case, Strange, 653; Foster *v.* Jackson, Hobart, 52; Horn *v.* Horn, Ambler, 79; Cooper *v.* Bigalow, 1 Cow. 56; Taylor *v.* Waters, 5 M. & S. 103; Jaques *v.* Withy, 1 T. R. 557. But see Peacock *v.* Jeffery, 1 Taunt. 426; Simpson *v.* Hanley, 1 M. & S. 696.

(*f*) Poucher *v.* Holley, 3 Wend. 184; Yates *v.* Van Rensselaer, 5 Johns. 364.

(*g*) Cooper *v.* Bigalow, 1 Cowen, 206.

(*h*) Ewen *v.* Terry, 8 Cow. 126; Schermerhorn *v.* Schermerhorn, 3 Caines, 190; Duncan *v.* Bloomstock, 2 McCord, 318; Noble *v.* Howard, 2 Hayw. 14; Best *v.* Lawson, 1 Miles, 11; Barker *v.* Braham, 2 Black. R. 869, 3 Wils. 396; Hall *v.* Ody, 2 Bos. & Puf. 28; Simpson *v.* Hart, 1 Johns. Ch. 91, 14 Johns. 63; Bristowe *v.* Needham, 7 M. & G. 648; Brewerton *v.* Harris, 1 Johns. 144.

(*i*) Mason *v.* Knowlson, 1 Hill, 218.

(*j*) Hutchins *v.* Riddle, 12 N. H. R. 464; Shapley *v.* Bellows, 4 N. H. R. 351; Goodenow *v.* Buttrick, 7 Mass. 140; Dennie *v.* Elliott, 2 H. Bl. 587.

against costs alone, or against debt and costs. (*k*) After some fluctuations, it seems to be settled as the better opinion that this set-off will be made without regard to the attorney's lien, on the ground that this extends only to the net amount due after the equities between the parties are adjusted. (*l*)

Judgments will be set off on motion, because the question on which they depend has been tried and settled, and the claim established, or admitted. (*m*) But other claims than those resting on judgments must be pleaded, or filed in such manner as the statutes or rules of court direct, with sufficient notice for the plaintiff to deny and contest them if he chooses to do so. For not even the amount of a note will be set off, unless the plaintiff had the opportunity to contest it, nor even the amount of a verdict recovered, for it may be that this will be set aside. (*n*)

The amount due on the condition of a bond may generally be pleaded in set-off, but not the penalty; for this may be reduced both at law or in equity. (*o*) But if the full

(*k*) Nunez *v.* Modigliani, 1 H. Bl. 217. The old practice was otherwise. See Butler *v.* Inneys, 2 Strange, 891. But the rule stated in the text is now firmly established. James *v.* Raggett, 2 B. & Ald. 776; Thrustout *v.* Craster, 2 Black. R. 826; Howell *v.* Harding, 8 East, Thrustout *v.* Craster, 2 Black. R. 826; 362; Lang *v.* Webber, 1 Price, 375; Hurd *v.* Fogg, 2 Foster, 98. But if this set-off of costs is sought by motion to the court, it will be granted or not, according to the justice of the case. Gihon *v.* Fryatt, 2 Sandf. 638. In McWilliams *v.* Hopkins, 1 Whart. 275, it was *held* that a judgment for costs obtained against an administrator plaintiff in the District Court for the City and County of Philadelphia, and assigned by the defendant there to A., cannot be set off against a judgment for damages obtained by such administrator against A. in the Supreme Court.

(*l*) Roberts *v.* Mackoul, cited in Thrustout *v.* Craster, 2 Black. R. 826; Schoole *v.* Noble, 1 H. Bl. 23; Nunez *v.* Modigliani, 1 H. Bl. 217; Vaughan *v.* Davies, 2 H. Bl. 440; Dennie *v.* Elliott, 2 H. Bl. 587; Hall *v.* Ody, 2 B. & P. 28; Emdin *v.* Darley, 4 B. & P. 22; Lane *v.* Pearce, 12 Price, 742, 752; Taylor *v.* Popham, 15 Ves. 72; *Ex parte* Rhodes, Id. 539; Mohawk Bank *v.* Burrows, 6 Johns. Ch. 317; The People *v.* New York Common Pleas, 13 Wend. 649; Spence *v.* White, 1 Johns. Cas. 102; Porter *v.* Lane, 8 Johns. 357; Martin *v.* Hawks, 15 Johns. 405. But see Mitchell *v.* Oldfield, 4 T. R. 123; Randle *v.* Fuller, 6 T. R. 456; Glaister *v.* Hewer, 8 T. R. 69; Read *v.* Dupper, 6 T. R. 361; Middleton *v.* Hill, 1 M. & S. 240; Harrison *v.* Bainbridge, 2 B. & C. 800; Shapley *v.* Bellows, 4 N. H. R. 353; Dunklee *v.* Locke, 13 Mass. 525; Barrett *v.* Barrett, 8 Pick. 342; Ainslie *v.* Boynton, 2 Barbour, 258; Rider *v.* Ocean Ins. Co. 20 Pick. 259. And see note to Schermerhorn *v.* Schermerhorn, 3 Caines, 190.

(*m*) And it is only such a judgment that can be set off on *motion*. The judgment must be *conclusive* upon the party, rendered in a court which had jurisdiction, and the decision must have been final, and not appealed from. See Harris *v.* Palmer, 5 Barbour, 105; The People *v.* Judges, 6 Cowen, 598. And see Willard *v.* Fox, 18 Johns. 497; Weatherred *v.* Mays, 1 Texas, 472.

(*n*) Bagg *v.* Jefferson, C. P. 10 Wend. 615; Cobb *v.* Haydock, 4 Day, 472.

(*o*) Burgess *v.* Tucker, 5 Johns. 105; Nedriffe *v.* Hogan, 2 Burr. 1024.

amount of a bond is agreed upon as liquidated damages, it may be set off. (*p*)

One important and very general principle in the law of set-off is, that the demand must be due to the party, or the claim must be possessed by him, *in his own right*. (*q*) But this may be, either as original creditor or payee, or as owner by assignment. It seems indeed to be settled that debts held in the right of another can be set off neither at law nor in equity. But a question sometimes exists as to the application of this rule. Whether a party holds a claim or debt for this purpose in his own right may perhaps be determined by two tests; first, can he sue for it in his own name, without setting forth as the foundation of his right some representative or vicarious character; and secondly, if he sued for and recovered the debt, would he have a right to use it at his own pleasure, and for his own benefit, or has he a valid lien on it for his own security. The rights to the two demands, one of which is to be balanced against the other by set-off, must be similar rights. Thus, if an executor sues *as* executor, the defendant may set off a debt due from the testator; (*r*) if he sues for a cause of action accruing *after* the testator's death, and does not describe himself as executor, the defendant cannot set off a debt due to him from the testator; (*s*) he cannot himself set off a debt due to him personally against a claim on the estate of the testator made

(*p*) Fletcher *v.* Dyche, 2 T. R. 32; Duckworth *v.* Alison, 1 M. & W. 412.

(*q*) This is too universally settled to need the citation of adjudged cases.

(*r*) But if the defendant has purchased a debt against an intestate, *since his death*, it has been held that he cannot set it off against an action by the administrator to recover a debt due the intestate. Root *v.* Taylor, 20 Johns. 137; Whitehead *v.* Cade, 1 How. [Miss.] 95.

(*s*) Kilvington *v.* Stevenson, Willes, 264, note; Tegetmeyer *v.* Lumley, Id.; Schofield *v.* Corbett, 6 Nev. & Man. 527; Houston *v.* Robertson, 4 Camp. 342; Mercein *v.* Smith, 2 Hill, 210; Fry *v.* Evans, 8 Wend. 530; Dale *v.* Cook, 4 Johns. Ch. 13; Colby *v.* Colby, 2 N. H. 419; Wolfersberger *v.* Bucher, 10 S. & R. 10; Brown *v.* Garland, 1 Wash. 221; Rapier *v.* Holland, Minor, 176; Burton *v.* Chinn, Hardin, 252; Mellen *v.* Boarman, 13 S. & M. 100; Shaw *v.* Gookin, 7 N. H. 16. And see Stuart *v.* Commonwealth, 8 Watts, 74. In an action by an executor, a legacy bequeathed the defendant cannot be set off, although the executor has funds to pay the legacy. Robinson *v.* Robinson, 4 Harring. 418; Sorrelle *v.* Sorrelle, 5 Ala. 245. But if the executor is sued for a debt due from his testator in his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of the testator. Mardall *v.* Thellusson, 14 Eng. Law & Eq. R. 74. So where an executor is sued for a debt created by himself as executor, he may set off a debt due from the plaintiff to the testator in his lifetime. Blakesley *v.* Smallwood, 8 Q. B. 538.

against him as executor; (*t*) nor if he be sued for his own debt can he set off a debt due to him as executor. (*u*) So a debt due to a man in right of his wife cannot be set off in an action against him on his own bond. (*v*) Nor can a debt contracted by the wife, before marriage, be set off in an action brought by the husband alone; (*w*) unless he has by his promise to pay it made it his own debt. So in a suit either at law or in equity against partners, the demand of one of the defendants against the plaintiff cannot be set off. (*x*)

It sometimes happens that a demand may be set off, due from the person actually and beneficially interested in the suit, although it is brought for his benefit by one who has the legal interest, and is therefore plaintiff of record, but has no other interest. (*y*)

(*t*) Nor *vice versa*. Grew *v.* Burditt, 9 Pick. 265; Snow *v.* Conant, 8 Verm. 308; Cummins *v.* Williams, 5 J. J. Marsh. 384; Banton *v.* Hoomes, 1 A. K. Marsh. 19; Harbin *v.* Levi, 6 Ala. 399. In an action against an executor to recover a legacy given to the plaintiff's wife, the executor may set off a bond given by the plaintiff himself to the testator in his lifetime. Lowman's Appeal, 3 Watts & Serg. 349.

(*u*) Thomas *v.* Hopper, 5 Ala. 442.

(*v*) Paynter *v.* Walker, Bull. N. P. 179. In an action by husband and wife for a legacy left to the wife "for her own use," the executor cannot set off a debt due from the husband to the testator in his lifetime. Jamison *v.* Brady, 6 S. & R. 466. Otherwise if the legacy is given to the wife not to her separate use. Lowman's Appeal, 3 Watts & S. 349. Neither can the husband's debt be set off against the wife's distributive share of her father's estate, when the parties have been divorced; and although such divorce was after the intestate's death. Fink *v.* Hake, 6 Watts, 131. In a suit by husband and wife for rent of the wife's premises, the defendant may set off a demand against the husband alone. Ferguson *v.* Lothrop, 15 Wend. 625. But see Naglee *v.* Ingersoll, 7 Penn. St. 185, where it was held that a debt due by a husband, or one which he had agreed to pay, could not be set off against a claim for rent due to his wife's separate estate, although she had authorized him to receive the rents without accounting.

(*w*) Burrough *v.* Moss, 10 B. & C. 558; Wood *v.* Akers, 2 Esp. 594.

(*x*) The decisions are uniform that a joint debt cannot be set off against a separate debt, nor *vice versa*. Woods *v.* Carlisle, 6 N. H. 27; Walker *v.* Leighton, 11 Mass. 140; Howe *v.* Sheppard, 2 Sumner, 409; McDowell *v.* Tyson, 14 S. & R. 300; Bibb *v.* Saunders, 2 Bibb, 86; Armistead *v.* Butler, 1 H. & M. 176; Palmer *v.* Green, 6 Conn. 14; Emerson *v.* Baylies, 19 Pick. 59; Warren *v.* Wells, 1 Met. 80. And see Grant *v.* Royal Exch. Ass. Co. 5 M. & S. 439. If there is an *express agreement* with a person dealing with a firm, that the debts severally due from the members of the firm to that person shall be set off against any demands which the firm may have jointly on him, such agreement is binding, and the set-off may be allowed. Kinnerley *v.* Hossack, 2 Taunt. 128; Hood *v.* Riley, 3 Green, 127. See Lovel *v.* Whitridge, 1 McCord, 7; Evernghim *v.* Ensworth, 7 Wend. 326. So if the surviving partner sue for a debt due the firm, the defendant may set off a debt due from such partner alone. Holbrook *v.* Lackey, 13 Met. 132. But see Meader *v.* Scott, 4 Verm. 26; Lewis *v.* Culbertson, 11 S. & R. 48.

(*y*) See Campbell *v.* Hamilton, 4 Wash. C. C. R. 93. But see *infra*, nn. (*n*), (*o*).

If there is more than one defendant, neither one can set off a demand due to himself alone, but all may set off demands due to all jointly. Nor can a single defendant set off a debt due to him from a part only of two or more plaintiffs. (*z*)

No demand can be pleaded in set-off, unless it be reasonably certain. But by this is meant to exclude only those cases in which a jury must determine the amount of damages, by their own estimate or opinion, and not by mere calculation, if they find the claim valid. In general, demands may be set off, which are for liquidated damages, meaning thereby when their amount is specific, or is directly and distinctly ascertainable by calculation; and also all those which usually may be sued for and recovered under the common counts. (*a*)

(*z*) Ross *v.* Knight, 4 N. H. R. 236; Henderson *v.* Lewis, 9 S. & R. 379; Banks *v.* Pike, 15 Maine, 268; Fuller *v.* Wright, 18 Pick. 403; Watson *v.* Hensel, 7 Watts, 344; Archer *v.* Dunn, 2 Watts & Serg. 327; Trammell *v.* Harrell, 4 Pike, 602; Jones *v.* Gilreath, 6 Iredell. 338; Vose *v.* Philbrook, 3 Story, 335. The statutes in some States are different. But in an action against principal and surety, for the default of the principal, a debt from the plaintiff to the principal alone has in some cases been allowed to be set off. Brundridge *v.* Whitecomb, 1 Chip. 180; Crist *v.* Brindle, 2 Rawle, 121. See Lynch *v.* Brag, 13 Ala. 773; Mahurin *v.* Pearson, 8 N. H. R. 539; Prince *v.* Fuller, 34 Maine, 122. And such was the civil law. 2 Story's Eq. Jur. s. 1442. But see Warren *v.* Wells, 1 Met. 80; Walker *v.* Leighton, 11 Mass. 140. So where a tax collector gives a joint *and several* bond to a town, with sureties, and then sues the town in his town name, on an order of the town to him, the town may set off money which the plaintiff has received and not paid over, in breach of his bond. Donelson *v.* Colerain, 4 Met. 430.

(*a*) This rule arises from the words of the statute, before cited, that a set-off is allowed in cases of mutual *debts*, *i. e.*, claims in the nature of a debt; and the same rule is applied to both parties. For if the suit is brought not for a *debt*, but for unliquidated damages, no defence of set-off can be allowed. Hardcastle *v.* Netherwood, 5 B. & Ald. 93, which was an action for not indemnifying the plaintiff for paying the defendant's own proper debt; Hutchinson *v.* Reid, 3 Camp. 329, for not accepting a bill of exchange; Birch *v.* Depeyster, 4 Camp. 385, against an agent for not accounting; Gillingham *v.* Waskett, 13 Price, 434, for not replacing stock according to agreement; Warn *v.* Bickford, 7 Price, 550, for breach of a covenant for quiet enjoyment; Attwool *v.* Attwool, 18 Eng. Law & Eq. R. 386, for breach of a bond to indemnify generally; Castelli *v.* Boddington, 16 Eng. Law & Eq. R. 127, an action on a policy of insurance for an average loss. And see Cope *v.* Joseph, 9 Price, 155; Gordon *v.* Bowne, 2 Johns. 150; Osborn *v.* Etheridge, 13 Wend. 339, a suit by a tenant against his landlord, to recover costs of the defence of summary proceedings, instituted by the latter; Cooper *v.* Robinson, 2 Chitty, 161, for not indemnifying plaintiff from certain taxes; Wilmot *v.* Hurd, 11 Wend. 584, for breach of warranty in the sale of goods; Dowd *v.* Faucett, 4 Dev. 92, covenant for uncertain damages. More frequent illustrations exist of claims which cannot be used by a defendant by way of set-off, because they are not *debts*, within the statutory meaning of that word. Thus it seems that unliquidated losses on a policy of insurance cannot be made the subject of set-off. Thomson *v.* Redman, 11 M. & W. 487; Grant *v.* Royal Exch. Ass. Co. 5 M. & S. 437. And

It may, perhaps, be doubtful, when compensation for part performance of a contract may be set off against an action for breach of the contract, and when it should rather be given in evidence by way of reduction, or when it can only be used as the ground of a cross action. (*b*) This must depend upon the circumstances of the case, and upon the provisions of the statute in the State where the action is tried.

Set-off should, however, be discriminated from *reduction*, and *recoupment;* to both of which it bears much analogy, and with either of which it may be so mingled by the facts of a case as to make it difficult to say in which of these forms the opposing demand should be brought against the plaintiff's action. In general, a defendant may deduct from the plaintiff's claim all just demands, or claims owned by him, or payments made by him, in the very same transaction, or even in other but closely connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action, so much as he seeks, and not that he ought not to pay the plaintiff so much, because on another cause of action the plaintiff owes him. If he can so present and use his claims he diminishes the plaintiff's claim by way of reduction. (*c*) Recoupment we consider to belong rather to cases

see Cumming *v.* Forester, 1 Id. 494. Nor can a claim for tortiously taking the defendant's property be set off. Hopkins *v.* Megquire, 35 Maine, 78. Neither is a breach of a covenant for the non-delivery of goods according to contract a subject of set-off. Howlet *v.* Strickland, Cowp. 56; Wright *v.* Smyth, 4 Watts & Serg. 527. Nor a breach of a guaranty when the damages are uncertain. Morley *v.* Inglis, 4 Bing. N. C. 58; Crawford *v.* Stirling, 4 Esp. 207. *Contra* if the damages are certain. Collins *v.* Wallis, 11 J. B. Moore, 248. So to an action by a bank, the defendant cannot set off his stock in the bank. Harper *v.* Calhoun, 7 How. [Miss.] 203; Whittington *v.* Farmers' Bank, 5 H. & J. 489. Nor can he set off the bills of such bank. Hallowell Bank *v.* Howard, 13 Mass. 235. A note payable in work cannot be set off against a demand payable in cash. Prather *v.* McEvoy, 7 Missouri, 598. In Massachusetts, taxes are not the subject of set-off. Peirce *v.* Boston, 3 Met. 520.

(*b*) As to the right of the defendant to reduce the plaintiff's demand in the cases mentioned *ante*, p. 35, n. (*d*), see the following cases. Basten *v.* Butter, 7 East, 479; Farnsworth *v.* Garrard, 1 Campb. 38; Denew *v.* Daverell, 3 Campb. 451; Mondel *v.* Steel, 8 M. & W. 858; Heck *v.* Shener, 4 S. & R. 249; Still *v.* Hall, 20 Wend. 51; Hunt *v.* The Otis Company, 4 Met. 464; McAllister *v.* Reab, 4 Wend. 483, 8 id. 109; Britton *v.* Turner, 6 N. H. 481.

(*c*) The difference between allowing a certain defence by way of *set-off*, and by way of *reduction of damages*, although not broad is yet clear and well defined. A few instances will illustrate the application of the principle. Thus, in assumpsit for dyeing goods, the defendant may, at common law, show that there is a custom of the trade by which damages done the goods in dyeing shall

where the same contract lays mutual duties and obligations on the two parties, and one seeking remedy for the breach of duty by the second, the second meets the demand by a claim for a breach of duty against the first. But the word is of recent introduction, and is not used with uniformity or precision. (*d*) The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but a part or the whole of this debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him.

It should be remarked that a set-off is a defence which the defendant may use or not at his pleasure. If he forbears doing so, this in no way impairs his right to establish his claim by a separate action. (*e*) It is, however, better that it should be settled by set-off, when that can properly be done, because it saves both expense and time to do this. And courts have censured parties for not pleading a demand by way of set-off, when there was nothing to show that it might not have been made perfectly available to the defendant in

be deducted from the price of dyeing. Bamford *v.* Harris, 1 Stark. 343. So a master may show in an action by a servant for his wages, that the plaintiff agreed to deduct therefrom the value of goods lost by his negligence. Le Loir *v.* Bristow, 4 Campb. 134. And see Dobson *v.* Lockhart, 5 T. R. 133; Kinnerley *v.* Hossack, 2 Taunt. 170; Cleworth *v.* Pickford, 7 M. & W. 314. So in an action for work and labor and materials, the defendant may show without pleading any set-off, that he supplied part of the materials himself. Newton *v.* Forster, 12 M. & W. 772; Turner *v.* Diaper, 2 Mann. & Gr. 241. And see Dale *v.* Sollet, 4 Burr. 2133.

(*d*) The doctrine of *recoupment*, or *recouper*, as it was formerly termed, is not a new one in the common law, although it was formerly used in a different sense from that alluded to in the text. It was formerly used to signify, as it is now in many courts, and decisions, a right of deduction from the amount of the plaintiff's claim, either from part payment, or defective performance of contract on the part of the plaintiff, or from any analogous fact. The same idea was expressed by *defalk*, *discount*, *deduction*, *reduction*, and in actions of tort by *mitigation*. But probably the definition of the text is the true and proper one, since the word *recouper* in the original signifies *to cut again*, and therefore would favor the definition above, and Barbour on set-off is in favor of the same use of the term. It is foreign from the present chapter to examine the doctrine of *recoupment* in all its details.

(*e*) Laing *v.* Chatham, 1 Camp. 252; Minor *v.* Walter, 17 Mass. 237; De Sylva *v.* Henry, 3 Port. 132; Baskerville *v.* Brown, 2 Burr. 1229; Himes *v.* Barnitz, 8 Watts, 39; Garrow *v.* Carpenter, 1 Port. 359. The civil law was different. 2 Story's Eq. Jur. § 1440. In some states a defendant cannot set off a claim, on which a suit is then pending in his favor. Lock *v.* Miller, 3 Stew. & Porter, 13. In others the contrary has been held. Stroh *v.* Uhrich, 1 Watts & Serg. 57. Neither can the plaintiff file a counter set-off to the defendant's set-off. Hudnall *v.* Scott, 2 Ala. 569; Ulrich *v.* Berger, 4 Watts & Serg. 19.

that way. For set-off is in the nature of a cross action, and is substituted for that, for the very purpose of preventing unnecessary litigation. Therefore, also, only those demands can be set off for which an action might be brought by the defendant, and sustained. If it be barred by the statute of limitations, or otherwise defeasible, it cannot be set off. (*f*)

A debt is not properly a subject of set-off, unless it existed when the plaintiff brought his action, and at that time belonged to the defendant; but it may have become the defendant's after the cause of action accrued to the plaintiff. And it must be due to the defendant when pleaded, and this should be alleged. (*g*)

An agreement to pay a debt in cash, or in any specific way, or even an express negative of set-off, does not, in general, deprive the defendant of paying it by setting off a debt due to himself. (*h*)

One who buys goods of a factor, as such, and is sued for the price by the real owner, cannot set off a debt due from the factor; (*i*) but he may if the factor sell the goods *as his*

(*f*) Chapple *v.* Durston, 1 Cr. & J. 1; Gilchrist *v.* Williams, 3 A. K. Marsh. 235; Williams *v.* Gilchrist, 3 Bibb, 49; Turnbull *v.* Strohecker, 4 McCord, 210; Jacks *v.* Moore, 1 Yeates, 391. And a debt discharged by bankruptcy or insolvency cannot be the subject of a set-off. Francis *v.* Dodsworth, 4 C. B. 202. Neither can a claim which the court would not have jurisdiction to try, if an action had been brought upon it, be allowed in set-off. Piquet *v.* Cormick, Dudley, 20. Nor a debt, the collection of which has been enjoined in Chancery. Key *v.* Wilson, 3 Humph. 405. Nor a note which the defendant holds, but which he cannot sue in *his own name*, as a note not negotiable. Bell *v.* Horton, 1 Ala. 413; Carew *v.* Northrup, 5 Ala. 367. Nor a bond which has been cancelled, but by mistake. Williams *v.* Crary, 5 Cow. 368. The maker of a note payable to A. B. or *bearer*, cannot set off against one who sues as bearer, any claim against A. B. or other person except the plaintiff. Parker *v.* Kendall, 3 Vermont, 540.

(*g*) Hardy *v.* Corlis, 1 Foster, 356; Dendy *v.* Powell, 3 M. & W. 442; Evans *v.* Prosser, 3 T. R. 186; Eland *v.* Karr, 1 East, 376; Richards *v.* James, 2 Exch. 471; Rogerson *v.* Ladbroke, 1 Bing. 93; Carpenter *v.* Butterfield, 3 Johns. Cas. 145; Jeff. Co. Bank *v.* Chapman, 19 Johns. 322; Braithwaite *v.* Coleman, 4 Nev. & Man. 654; Stewart *v.* U. S. Ins. Co. 9 Watts, 126; Morrison *v.* Moreland, 15 S. & R. 61; Huling *v.* Hugg, 1 W. & S. 418; Edwards *v.* Temple, 2 Harring. 322; Carprew *v.* Canavan, 4 How. (Miss.) 370. And if the defendant claims to set off the plaintiff's note, which has been indorsed to him, he must show that it came to him before the plaintiff's suit was commenced. Jeff. Co. Bank *v.* Chapman, 19 Johns. 322; Kelly *v.* Garrett, 1 Gilm. 649. Money paid by the defendant as surety for the plaintiff *after action brought*, but on an obligation entered into before, cannot be set off. Cox *v.* Cooper, 3 Ala. 256.

(*h*) Lechmere *v.* Hawkins, 2 Esp. 626; McGillivray, *v.* Simson, 2 C. & P. 320, 9 D. & R. 35; Loudon *v.* Tiffany, 5 Watts & S. 367; Baker *v.* Brown, 10 Missouri, 396.

(*i*) Browne *v.* Robinson, 2 Caines's Cas. in Error, 341; Gordon *v.* Church, 2 Caines, 299; Fish *v.* Kempton, 7 C. B. 687; Jarvis *v.* Chapple, 2 Chitty, 387.

own, with a right to do so, and the buyer does not know that they are not his own. (*j*) But he cannot set off a debt due to him from the principal, if the factor has a lien on the goods, even if the principal be mentioned at the sale. (*k*) And, if before they are delivered, or any payment made, the buyer is notified that they belong to a third person, he cannot set-off against an action by that person, a debt due to him from the factor. (*l*) A broker, being one to whom goods are not intrusted, and who usually and properly sells in the name of his principal, and who is understood to be only an agent, whether he sells in his own name or not, he stands only on the footing of an agent. (*m*) And if an action be brought by an agent in his own name for a debt due to his principal, the defendant may set off a debt due from such principal. (*n*)

(*j*) Carr *v.* Hinchliff, 4 B. & C. 547; Stracey *v.* Deey, 7 T. R. 361, note; Purchell *v.* Salter, 1 Q. B. 197. And see George *v.* Clagett, 7 T. R. 359; Rabone *v.* Williams, 7 T. R. 360, note; Pigeon *v.* Osborn, 12 Ad. & El. 715; Parker *v.* Donaldson, 2 Watts & S. 9; Gardner *v.* Allen, 6 Ala. 187; Sims *v.* Bond, 5 B. & Ad. 389: Waring *v.* Favenck, 1 Campb. 85; Westwood *v.* Bell, Holt's N. P. R. 124.

(*k*) Hudson *v.* Granger, 5 B. & Ald. 27; Drinkwater *v.* Goodwin, Cowp. 251. But if the factor has parted with the goods and lost his lien, the purchaser may set off his debt against the principal. Coppin *v.* Craig, 7 Taunt. 243; Coppin *v.* Walker, id. 236.

(*l*) 1 Har. & Edw. N. P. 356; Barbour on Set-off, 136; Rabone *v.* Williams, 7 T. R. 360, n.

(*m*) Wilson *v.* Codman, 3 Cranch, 193; Atkinson *v.* Teasdale, 1 Bay, 299; Godfrey *v.* Forrest, Id. 300.

(*n*) Royce *v.* Barnes, 11 Met. 276. This doctrine, however, is repudiated by the late English case of Isberg *v.* Bowden, 22 Eng. Law & Eq. 551. That was an action for freight due under a charter-party. Plea, that the plaintiff entered into the charter-party as master of the ship, and for, and on behalf of, and as agent for M., the owner; that the plaintiff never had any beneficial interest in the charter, or any lien on the freight, and that he brought the action solely as agent and trustee for M., and that M. was indebted to the defendant in a certain amount, which the defendant offered to set off. *Held*, on demurrer, that the statute of set-off did not apply. *Martin*, B., in delivering the judgment of the court, said,— "It was contended, on behalf of the plaintiff in support of the demurrer, that the plea was bad at common law, and could only be supported by virtue of the statute of set-off, and that inasmuch as the plaintiff in the action was not the debtor to the defendant, the case was not within the statute. It was admitted, on the other hand, that the plea was bad at common law, but contended that the statute had received a construction in several cases which were cited, and to which we shall presently refer, and that upon such construction the plea could be maintained. The statute enacts, 'that where there are mutual debts between the plaintiff and the defendant, one debt may be set against the other.' This is the whole enactment as applicable to the present case, and upon its true construction the question depends. If the words of the statute had been that where there were 'mutual debts the one might be set against the other,' the argument for the defendant would have had more weight; but these are not the only words, for the debts are to be mutual debts between the plaintiff and the defendant, and there is no debt here due from the plaintiff at all; and except the words 'between the plaintiff and the defendant' can be excluded, the plea cannot be maintained.

In general, if an agent be permitted by his principal to act as if he were the principal and not an agent, one dealing with him, and supposing him to be a principal, acquires the same rights, and among these the right of set-off, which he would have if the agent were a principal; nor can he be subsequently deprived of these rights by the coming in of a third party who was a stranger to him in the original transaction.

In support of his view, the defendant's counsel cited the case of Coppin *v.* Craig, where a plea, in substance the same as the present, was pleaded. The plea was not demurred to, and its validity or non-validity in point of law seems never to have been considered at all, and the matter decided by the court was quite collateral to the present question; so also a case of Jarvis *v.* Chapple, where a similar plea was pleaded, was also relied on. This was an action by an auctioneer, for goods sold and delivered, and the defendant pleaded that the plaintiff sold as agent for one Tappinger, who was indebted to the defendant, which debt was pleaded as a set-off. The plaintiff replied, that the goods were not the goods of Tappinger, and were not sold by the plaintiff as his agent, upon which issue was joined. The plaintiff was nonsuited at the trial, and the application to the court was to set aside this nonsuit. It is at once, therefore, obvious that the present question could not, by possibility, have arisen under such circumstances. The case of Carr *v.* Hinchliff, and several other cases decided on the same principle, were also cited. It is quite true that there are expressions in the judgment of the learned judges in that case which seem to support the argument for the defendant; but the real ground upon which that and the other cases decided on the same point proceeded is, that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal. The cases of Carr *v.* Hinchliff, George *v.* Clagett, 7 Term Rep. 359, and Rabone *v.* Williams, Ibid. 360, n., are all explained on that principle in Tucker *v.* Tucker. By this case and that of Wake *v.* Tinkler, and Lane *v.* Chandler, referred to in 7 East, 153, the cases of Bottomley *v.* Brooke, and Rudge *v.* Birch, must be considered as entirely overruled, and the case of Tucker *v.* Tucker goes far to show that the statute of set-off is confined to the legal debts between the parties, the sole object of the statute being to prevent cross actions between the same parties. The case of Stackwood *v.* Dunn was cited on behalf of the defendant. It is enough to say that this case goes much beyond that. In that case it seems to have been ruled that the demurrer having confessed the truth of the pleas, the set-off was to be allowed between the parties. The cases cited in Story on Agency, p. 361, sect. 409, as the authority for what is there said, are those already adverted to from 7 Taunton, 237 and 243, and shown not to support the general proposition. In this case the plaintiff was the party whom the defendant agreed to pay, and we think that, looking at the plain words of the statute, we best give effect to the true rule now adopted by all the courts at Westminster for its construction, by holding, that inasmuch as the debts are not mutual debts between the plaintiff and the defendant, the one cannot be set off against the other. This is acting upon the rule as to giving effect to all the words of the statute; a rule universally applicable to all writings, and which we think ought not to be departed from, except upon very clear and strong grounds, which do not, in our opinion, exist in this case."

When an action is brought by or against a trustee, in that capacity, money due to or from the *cestui qui trust*, may be set off; for it will be considered that the party in interest, and not merely the party of record, is the one by whom or against whom the set-off should be made. (*o*)

Set-off, it has been said, is in the nature of a cross action, which may be for a larger amount than was due on the original action. If, therefore, the defendant files and sustains his set-off, and the result is not only that he owes the plaintiff nothing, but that the plaintiff owes him a balance when the mutual and opposing claims are adjusted, the defendant may have judgment and execution against the plaintiff, in that action, for the balance or surplus due to him. (*p*)

Of the notice of set-off, which must depend much on the several statutes and the rules of court, it is only necessary to say, that it must be very precise and certain. For set-off is in effect, as has been often said, in the nature of a cross action, of which the notice is the declaration, and it should

(*o*) Campbell *v.* Hamilton, 4 Wash. C. C. R. 93; Sheldon *v.* Kendall, 7 Cush. 217. See Barrett *v.* Barrett, 8 Pick. 342. But see Wheeler *v.* Raymond, 5 Cow. 231, 9 Cowen, 295; Beale *v.* Coon, 2 Watts, 183; Porter *v.* Morris, 2 Harring. 509; President, &c. *v.* Ogle, Wright, 281; Tucker *v.* Tucker, 4 B. & Ad. 745. In this case S. gave a bond, conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved the will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C., in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for a payment of a sum of money to the use of S., if C. should marry and survive her intended husband. She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond. *Held*, that in this action the claim of E. upon S.'s bond could not be set off. See Isberg *v.* Bowden, *ante*, and the remarks of *Martin*, B. In Hurlbert *v.* Pacific Ins. Co. 2 Sumner, 472, where the subject was fully discussed, it was decided that where an insurance was effected by an agent, for the benefit of whom it concerned, and the agent brought an action *in his own name*, the Insurance Co. could not set off a debt due them from the agent in his own right. Williams *v.* Ocean Ins. Co. 2 Met. 303, is to the same effect.

(*p*) In England this cannot be done, but the defendant must bring his action for the surplus. Hennell *v.* Fairlamb, 3 Esp. 104. But in America, such a course is common. Good *v.* Good, 9 Watts, 567; Cowsar *v.* Wade, 2 Brev. 291. And the plaintiff cannot file any counter set-off, Hall *v.* Cook, 1 Ala. 629; nor discontinue his action, Riley *v.* Carter, 3 Humph. 230. A defendant cannot file the same account in set-off to two separate actions by the same plaintiff. Chase *v.* Strain, 15 N. H. R. 535.

be in fact and substance, if not in form, as full and as clear and definite as a declaration, in order that the plaintiff may have the same opportunity of knowing precisely what claim is made against him, that he would have if it were made by an original action. (*q*)

A defendant has a right to withdraw his account in set-off, although this may expose the plaintiff's claim to the statute of limitations, by the absence of all other evidence, of any mutual and open accounts. (*r*)

SECTION XII.

OF ILLEGAL CONTRACTS.

We have already spoken of illegal contracts in connection with other subjects, and especially of an illegal consideration, in our first volume. We would add here, that as all contracts which provide that any thing shall be done which is distinctly prohibited by law, or morality, or public policy, are void, (*s*) so he who advances money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done, rescind the contract, and prevent the thing from being done, and recover back his money. (*t*) But it would seem

(*q*) See Barbour on Set-off. Babbington on Set-off.

(*r*) Theobald *v.* Colby, 35 Maine, 179; Muirhead *v.* Kirkpatrick, 5 W. & S. 506; Cary *v.* Bancroft, 14 Pick. 318.

(*s*) This principle is embodied in the maxim, *ex turpi causa, non oritur actio.* No principle is better settled in the law, as the following among many other authorities show. Shiffner *v.* Gordon, 12 East, 304; Belding *v.* Pitkin, 2 Caines, 149; Springfield Bank *v.* Merrick, 14 Mass. 322; Russell *v.* De Grand, 15 Mass. 39; Wheeler *v.* Russell, 17 Mass. 281; Allen *v.* Rescous, 2 Lev. 174; Fletcher *v.* Harcot, Hutton, 56; Holman *v.* Johnson, Cowp. 343; Gaslight Co. *v.* Turner, 7 Scott, 779; Wetherell *v.* Jones, 3 B. & Ad. 221; Fivaz *v.* Nichols, 2 C. B. 501; Simpson *v.* Bloss, 7 Taunt. 246.

(*t*) Thus, in White *v.* The Franklin Bank, 22 Pick. 181, where, upon the deposit of money in a bank, the depositor received a book containing the cashier's certificate thereof, in which it was stated that the money was to remain in deposit for a certain time, it was *held*, that such agreement was illegal and void, under the Revised Statutes, c. 36, § 57, as being *a contract by the bank for the payment of money at a future day certain;* and that no action could be maintained by the depositor against the bank upon such express contract; but that he might recover back the money in an action commenced before the expiration of the time for which it was to remain in deposit, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained with-

obvious that if he delays rescinding until his rescision is inoperative, and the thing will still be done, although the contract, at the time of the rescision, was in form executory, it should come under the same rule as an executed contract for unlawful purposes; and here the law, in general, refuses to interfere, but leaves both parties as they were; (*u*) unless the case shows that there is a substantial difference between them; the one doing and the other suffering the wrong. And in this case the sufferer may have a remedy, but not the wrongdoer. (*v*)

The more important classes of contracts in which the question of illegality has arisen, are contracts in restraint of marriage, contracts in restraint of trade, contracts which violate the revenue laws of foreign countries, contracts which tend to corrupt legislation, wagering contracts, and champerty and maintenance. Contracts in restraint of marriage we have already noticed in our first volume. (*w*) The others we shall consider briefly in this place.

1. *Of contracts in restraint of trade.*

It is not only a defence to a contract that it requires of the defendant, or that the defendant by it promised to do an act which the law forbade his doing, but it may also be a defence, that by the contract the defendant undertook to do what the plaintiff was forbidden by law to ask of him. Generally these two cases would be the same; for it is not often that it is unlawful to ask what it would be lawful to

out a previous demand. And the following cases were relied upon as showing that money advanced upon an illegal contract may be recovered back. Bartlett *v.* Vinor, Carth. 252; De Begnis *v.* Armistead, 10 Bing. 110; Langton *v.* Hughes, 1 M. & S. 596; Gallini *v.* Laboric, 5 T. R. 242; Springfield Bank *v.* Merrick, 14 Mass. 322; Wheeler *v.* Russell, 17 Mass. 258; Lacaussade *v.* White, 7 T. R. 535; Cotton *v.* Thurland, 5 T. R. 405; Smith *v.* Bickmore, 4 Taunt. 474; Scott *v.* Nesbitt, 2 Cox, 183; Parker *v.* Rochester, 4 Johns. Ch. 330; Wheaton *v.* Hibbard, 20 Johns. 290; Fitzroy *v.* Gwillim, 1 T. R. 153; Robinson *v.* Bland, 2 Burr. 1077; Tenant *v.* Elliott, 1 B. & P. 3; Utica Ins. Co. *v.* Scott, 19 Johns. 1; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Utica Ins. Co. *v.* Kip, 8 Cow. 20; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296.

(*u*) Foote *v.* Emerson, 10 Verm. 338; Dixon *v.* Olmstead, 9 Verm. 310; Lubbock *v.* Potts, 7 East, 449; Howson *v.* Hancock, 8 T. R. 577.

(*v*) See White *v.* The Franklin Bank, 22 Pick. 181.

(*w*) See vol. 1, pp. 555, 556.

do. But the distinction exists, and may be well illustrated by certain contracts which are called "contracts in restraint of trade," and which the policy of the law is said to make illegal and void. If therefore an action be brought on such a contract to recover damages for carrying on the trade which it is agreed shall be abandoned, the defence of illegality may be made. And yet it is certain that every one is at full liberty to abandon or to vary his trade or occupation at his own pleasure. By these contracts, which the law makes void, such a promise is made; that is, one who exercises any trade, business, or occupation, promises to abandon the same, and thereafter exercise it no more.

The history of the law upon this subject is somewhat peculiar. So long ago as in the times of the Year Books the courts frowned with great severity upon every contract of this kind. But after a while this excessive aversion became much mitigated. Many exceptions and qualifications were allowed. These were gradually enlarged, until it became the settled rule that while a contract not to carry on one's trade *anywhere* was null and void, a contract not to carry it on in a particular place, or within certain limits, was good and enforceable at law.

If the series of cases in relation to this subject are critically examined, (*x*) and considered in connection with the

(*x*) The principal cases on this subject are here stated in chronological order. The first reported case to be found is in the Year Book, 2 Hen. 5, fol. 5, pl. 26, (1415). There a writ of debt was brought on an obligation by one John Dyer, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, &c., for a certain time, to wit, for half a year, the obligation to lose its force; and said that he did not use his art of dyer's craft within the limited time, which he averred, and prayed judgment, &c. *Hull.* In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law; and by G—, if the plaintiff were here, he should go to prison till he paid a fine to the king. In Colgate *v.* Bacheler, Cro. Eliz. 872, it was *held* that a bond conditioned to pay £20 if A. shall use the trade of a haberdasher within a certain time and place, is void. But in Rogers *v.* Parrey, 2 Bulstr. 136, the court declared that a man may be well bound and restrained from using his trade for a time certain and in a place certain. See also Jelliet *v.* Broade, Noy, 98, where the court declared substantially the same doctrine. See also Prugnell *v.* Gosse, Aleyn, 67; Clerk *v.* Tailors of Exeter, 3 Lev. 231. In Broad *v.* Jollyfe, Cro. Jac. 596, (1621) the principle was expressed thus:—"Upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers; and it is usual here in Lon-

cotemporary alterations in the law or usage in other respects, we cannot but think that much reason will be found for

don for one to let his shop and wares to his servant when he is out of his apprenticeship; as also to covenant that he shall not use that trade in such a shop or in such a street; so for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for *volenti non fit injuria*." But the leading case on this subject is Mitchell *v.* Reynolds, Fort. 296, 1 P. Wms. 181. There the condition of a bond was that neither the defendant nor his assigns should keep a victualling house, or vend liquor therein, or in any other place within a mile of Rosemary-lane, during twenty-one years; the consideration was, that the defendant had assigned his interest in this house to the plaintiff. It was *held* that this bond was valid, because grounded on a special consideration, set down in the bond, which made it a reasonable contract; but otherwise, if there had been no particular consideration to balance the restraint of trade. So a bond conditioned not to set up trade in any part of England is void, because this cannot be any advantage to the obligee, and serves only the purpose of oppression. This was followed by Cheesman *v.* Ramby, Fort. 297, 2 Strange, 739, where the condition of a bond was that the defendant should not set up trade within half a mile of the plaintiff's then dwelling-house, or any other house that she, her executors or administrators, should think fit to remove to, to carry on the trade of a linen draper. The consideration was, that the plaintiff was to take the defendant's wife as a hired servant to her, to assist her in the trade of linen draper for three years, without any money, whereas she did reasonably deserve £100 with such servant. It was *held* that the bond was valid; because it was grounded on a good consideration, and did not amount to a general restraint. In Davis *v.* Mason, 5 T. R. 118, (1793) the same question was before the court. There, in consideration that A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practice on his own account for fourteen years within ten miles of the place where A. lived, and gave a bond for this purpose; this bond was held good in law. Still again in Bunn *v.* Guy, 4 East, 190, (1803) a contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and not to practise himself in such business within certain limits, and to permit them to make use of his name in their firm for a certain time, but without his interference, &c., was holden to be valid in law. Three years afterwards, in the same court, in Gale *v.* Reed, 8 East, 80, (1806) the question was presented in a somewhat different form. By indenture between A. and B. and C. dissolving their partnership as rope-makers, A. and B. covenanted to allow C., during his life, 2*s.* on every cwt. of cordage which they should make on the recommendation of C. for any of his friends and connections, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connections whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted, in his or their names, pursuant to the indenture, should be the exclusive property of A. and B., and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him, by or for his friends and connections, on the terms aforesaid, and should not employ any other person to make cordage on any pretence whatsoever. *Held*, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c., A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void as being in restraint of trade without adequate consideration, for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to

believing that the law in relation to these contracts grew out of the English law of apprenticeship, to which we have

work for any of his friends who were refused to be trusted by A. and B., by which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade. And in Hayward *v.* Young, 2 Chitty, 407, (1818) it was *held* that a bond by an apothecary not to set up business within twenty miles is not illegal as in restraint of trade. In Bryson *v.* Whitehead, 1 Sim. & Stuart, 74, (1822) the Vice-Chancellor of England, Sir *John Leach*, said: — "Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the Master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years, and a limited covenant, in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing that the agreement should be so modified." Three years afterwards, in Homer *v.* Ashford, 3 Bing. 322, the same general principle and limitations were recognized. Wickens *v.* Evans, 3 You. & Jer. 318, (1829) recognizes the same general principles. And this was followed by the same court in Young *v.* Timmins, 1 Cr. & Jer. 331, (1831) where an agreement in *partial* restraint of trade was declared void for want of consideration. And in the same year was decided in the Common Pleas the important case of Horner *v.* Graves, 7 Bing. 735, (1831). It was there *held*, after mature deliberation, that an agreement that defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months notice, was unreasonable and void. See further, Hitchcock *v.* Coker, 1 Nev. & Per. 796. (1836); Archer *v.* Marsh, 6 Ad. & El. 959, (1837); Wallis *v.* Day, 2 M. & W. 273, (1837); Leighton *v.* Wales, 3 M. & W. 545; Ward *v.* Byrne, 5 M. & W. 548, (1839); Hinde *v.* Gray, 1 Mann. & Grang. 195; Proctor *v.* Sargent, 2 Man. & Gr. 20, (1840); Mallan *v.* May, 11 M. & W. 653, (1843); Rannie *v.* Irvine, 7 Man. & Gr. 969, (1844); Green *v.* Price, 13 M. & W. 695, (1845), 16 M. & W. 346; Pilkington *v.* Scott, 15 M. & W. 657, (1846); Nicholls *v.* Stretton, 10 Q. B, 346, (1847); Pemberton *v.* Vaughan, 11 Jur. 411; Hartley *v.* Cummings, 5 C. B. 247, (1847); Sainter *v.* Ferguson, 7 C. B. 716, (1849); Hastings *v.* Whitley, 2 Exch. 611, (1848). Where the agreement is not to keep a shop or practise a trade within a certain number of miles of a certain place, the shortest and nearest mode of access is to be the standard of estimate. Leigh *v.* Hind, 9 B. & C. 774; Woods *v.* Dennett, 2 Stark. 89. The principal American cases on this subject seem to be the following: — Pierce *v.* Fuller, 8 Mass. 223, (1811) where an obligation not to run a stage between Boston and Providence, a distance of about forty miles, in opposition to the plaintiff's stage, was held to be valid, having been made for a reasonable and good consideration. This was followed by Perkins *v.* Lyman, 9 Mass. 522, (1813). Four years after, the general principle as stated in the text was recognized and adopted in Pyke *v.* Thomas, 4 Bibb, 486. In 1823, the question came again before the Supreme Court of Massachusetts in Stearns *v.* Barrett, 1 Pick. 443, and the cases in the 8th and 9th Mass. above cited, were confirmed. The same court *held* in 1825, (Palmer *v.* Stebbins, 3 Pick. 188,) that a bond conditioned that the obligor shall give the obligee all the freighting of the obligor's goods up and down the Connecticut, at the customary price, to be paid in goods at the usual price, and that he shall not encourage any other boatman to compete with the obligee in the business of boating, is not void, as being in restraint of trade, and is founded on a sufficient consideration. The case of Nobles *v.* Bates, 7 Cowen, 307, (1827) seems to have been the next touching this question. There the agreement was not to carry on a certain trade "within twenty miles of a certain stand." The agreement was held binding, the court observing: — "A bond or promise upon good consideration, not to exercise a trade for a

already referred. By this law in its original severity, no person could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company. If he had a trade, he must continue in that trade, or have none. To relinquish it, therefore, was to throw himself out of employment; to fall as a burden upon the community; to become a pauper. And it is not surprising that a judge in the reign of Henry 5th should speak of a promise to do this in language which would now be, because indecorous, impossible. But this ancient severity of the law of apprenticeship abated; and as this severity gradually relaxed, it will be seen that contracts "in restraint of trade" were treated with less and less of disfavor, until the present rule became established.

In the application of this rule we shall see a gradual enlargement, until, in this country at least, it seemed to be little more than nominal. The cases are quite numerous, but we believe that the first case in which a contract was sought to be enforced in which the renunciation was absolute, was in Massachusetts, in 1837; (*y*) and this is also

limited time, at a particular place, or within a particular parish, is good. But where it is general not to exercise a trade *throughout the kingdom*, it is bad, though founded on good consideration, as being a too unlimited restraint of trade; and operating oppressively upon one party, without being of any benefit to either." Again, in Pierce *v.* Woodward, 6 Pick. 206, (1828) the defendant sold the plaintiff a grocery store, and *verbally* agreed not to carry on the same kind of business within a "certain limited distance in the city of Boston." It was *held* that it was a sufficient consideration for such agreement if the plaintiff was thereby induced to make the purchase, and that this might be shown by parol, although the deed was silent about any such consideration. The next case in point of time was Alger *v.* Thacher, 19 Pick. 51, (1837) for which see next note. And see Vickery *v.* Welch, 19 Pick. 523. The whole subject was examined at much length by *Bronson*, J., in the subsequent case of Chappel *v.* Brockway, 21 Wend. 157, (1839). See further, Ross *v.* Sadgbeer, 21 Wend. 166; Jarvis *v.* Peck. 1 Hoff. Ch. 479, (1840); Bowser *v.* Bliss, 7 Blackf. 344, (1845).

(*y*) Alger *v.* Thacher, 19 Pick. 51. This was debt on a bond conditioned that the obligor should never carry on or be concerned in the business of founding iron. The case was argued at great length before the Supreme Judicial Court of Massachusetts, and all the cases from the Year Books to that time were cited. And *Morton*, J., in delivering the opinion of the court, said: — "Among the most ancient rules of the common law, we find it laid down, that bonds in restraint of trade are void. As early as the second year of Henry V. (A. D. 1415) we find by the Year Books that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true, the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and

nearly, if not quite, the first in which such a promise was declared to be wholly null, by direct adjudication; the statements in other cases, that a local limitation was necessary, and would make the promise enforceable, being for the most part, if not altogether, *obiter*. In the previous cases, such a promise, it is said, would be avoided by the law; but in none of them was this done, as there was always some limitation. But this was sometimes very wide. In one, for example, a promise not to use certain machines in any of the United States except *two* (Massachusetts and Rhode Island)

without exceptions. Then an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a *general* and a *limited restraint* of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I., A. D. 1621. Broad *v.* Jolyffe, Cro. Jac. 596, when it was holden, that a contract not to use a certain trade in a particular place was an exception to the general rule, and not void. And in the great and leading case on this subject, Mitchel *v.* Reynolds, reported in Lucas, 27, 85, 130, Fortescue, 296, and 1 P. Wms. 181, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void; while those limited as to time, or place, or persons, have been regarded as valid, and duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer. This doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England the law of apprenticeship and the law against the restraint of trade may have a connection. But we think it very clear that they do not, in any measure, depend upon each other. That the law under consideration has been adopted and practised upon in this country and in this State, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy, and carries out our constitutional prohibition of monopolies and exclusive privileges. The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations. 1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition, and enhance prices. 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void."

was held good, because "agreements to restrain trade in particular places are valid in law, and may be enforced." (z) In the case of Alger *v.* Thacher, already referred to, it was argued that the reason of the law against such contracts had passed away, and that this was shown by an extension of the exception which made the rule itself unmeaning; for it could hardly be said that all the United States except two were any "particular place," if this phrase was to be used with any reference to its ordinary meaning. The court, however, were of opinion that although the connection between such contracts and the law of apprenticeship might have originated the rules of law in relation to these contracts, in England, and we never had here a similar law or usage of apprenticeship, still there were sufficient reasons for sustaining the rule, in this country, as it had been laid down in previous cases. This may be regarded as a leading authority, and it leaves no other question than as to what shall be deemed "a reasonable limitation." If this question is to be answered by a reference to the cases, the probable conclusion would be, that almost any limitation would suffice. Still, however, if the courts adhere to the rule which seems now to be established, the limitation, to protect the contract, must be *bonâ fide*, and not a slight and unreal exception, inserted as a mere evasion of the law.

2. *Of contracts opposed to the revenue laws of other countries.*

A contract which violates or proposes to violate the revenue laws of the country in which it is made, is of course void. (a) But it seems to be quite settled, both in England and in this country, that a contract may lawfully be made for the purpose of violating the revenue laws of a foreign

(z) Stearns *v.* Barrett, 1 Pick. 443.

(a) Johnson *v.* Hudson, 11 East, 180; Cope *v.* Rowlands, 2 M. & W. 149; Smith *v.* Mawhood, 14 M. & W. 452; Meux *v.* Humphries, 3 C. & P. 79; Holman *v.* Johnson, Cowper, 341; Armstrong *v.* Toler, 11 Wheaton, 258; Cambioso *v.* Maffet, 2 Wash. C. C. 98; Hannay *v.* Eve, 3 Cranch, 242; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Langton *v.* Hughes, 1 M. & S. 593; Ritchie *v.* Smith, 6 C. B. 462; Hodgson *v.* Temple, 5 Taunt. 183; Catlin *v.* Bell, 4 Camp. 183.

country. (*b*) Perhaps this rule is the necessary result of the universal antagonism which now pervades, to some extent, the revenue laws of all the states in Christendom. Everywhere duties or imposts are laid, and nowhere is there any thought of regulating them, by any other principle than that of securing the greatest gain to the country which enacts them. For even the zealous promoters of what is called free trade rest their arguments in its favor on the profitableness of the system to the state by which it shall be adopted. And while it may seem immoral for courts to sanction the breach of the positive laws of a foreign state, yet it is too much to ask of them to enforce an observance of laws made almost professedly against the interest of the government to which they belong. The rule began in England, when the courts could not have adopted any other without breaking up the very profitable business which their merchants found in carrying on with different nations of the continent a trade prohibited by the laws of those nations. The same rule seems to be extended to such things as making false or depraved coin or counterfeit paper money, for use in a foreign country, although it is not perhaps so well settled. But it is obvious that arguments might be urged against this extension of the rule, which would not apply, at least with equal force, to the rule itself.

3. *Of contracts which tend to corrupt legislation.*

All those whose interests are to be affected by legislation, may, both morally and legally, for the protection or advancement of their interests, use all means of persuasion which do not come too near to bribery or corruption; but the promise of any personal advantage to a legislator is open to this objection, and therefore void. (*c*)

(*b*) Boucher *v.* Lawson, Cas. T. Hardw. 84; Holman *v.* Johnson, Cowper, 341; Biggs *v.* Lawrence, 3 T. R. 454; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Planché *v.* Fletcher, Doug. 251; Kohn *v.* Schooner Renaisance, 5 Louis. Ann. R. 25; Pellecat *v.* Angell, 2 Cr. M. & R. 311.

(*c*) See Clippinger *v.* Hepbaugh, 5 W. & S. 315; Wood *v.* McCann, 6 Dana, 366; Coppock *v.* Bower, 4 M. & W. 361; Hatzfield *v.* Gulden, 7 Watts, 152; Norman *v.* Cole, 3 Esp. 253.

4. *Of wagering contracts.*

It was formerly held in England, that some wagers are valid contracts at common law. (*d*) But they have been recently prohibited by statute in England and in parts of this country; and there are American courts which have denied to them any validity whatever. (*e*) Even if admitted to be valid, it is certain that this must be with important qualifications; (*f*) as for instance, that they shall not refer to another's person

(*d*) Good *v.* Elliot, 3 T. R. 693. The wager here was, whether one S. T. had, or had not, before a certain day, bought a wagon belonging to D. C. So a wager on the age of the plaintiff and defendant has been held good at common law. Hussey *v.* Crickitt, 3 Campb. 168. And see Bland *v.* Collett, 4 Campb. 157; Fisher *v.* Waltham, 4 Q. B. 889. So a wager on the result of an appeal from the Court of Chancery to the House of Lords has been held good, no fraud being intended, and the parties having no power to bias the decision. Jones *v.* Randall, Cowper, 37. And so of a wager on the price of foreign funds. Morgan *v.* Pebrer, 4 Scott, 230. So of a wager that a certain horse would win a certain race. Moon *v.* Durden, 2 Exch. 22. By the common law of England, therefore, wagers were not *per se* void, unless they affected the interests, feelings, or character of third persons, or lead to indecent evidence, or were contrary to public policy, or tended to immorality, or to a breach of some law. Lord *Campbell*, in Thackoorseydass *v.* Dhondmull, 6 Moore, P. C. 300; Doolubdass *v.* Ramloll, 3 Eng. Law & Eq. R. 39. And a few early decisions in America inclined the same way. Bunn *v.* Riker, 4 Johns. 426; Morgan *v.* Richards, 1 P. A. Browne, 171; Hasket *v.* Wootan, 1 Nott & McC. 180; Shepherd *v.* Sawyer, 2 Murphy, 26; Grant *v.* Hamilton, 3 McLean, 100; Ross *v.* Green, 4 Harring. 308; Dunman *v.* Strother, 1 Texas, 89; Barret *v.* Hampton, 2 Brevard, 226. But a different view was taken in many States, and *all wagers* were considered to be illegal, and contrary to good policy. Thus, in Collamer *v.* Day, 2 Vermont, 144, a wager that a certain chaise then in sight was the property of A. and not of B. was held void. And see Amory *v.* Gilman, 2 Mass. 1; Babcock *v.* Thompson, 3 Pick. 446; Ball *v.* Gilbert, 12 Met. 399, *Shaw*, C. J.; Hoit *v.* Hodge, 6 N. H. 104; Rice *v.* Gist, 1 Strobh. 82; Edgell *v.* McLaughlin, 6 Wharton, 176; Lewis *v.* Littlefield, 15 Maine, 233. But however the common law may be, all wagers are now forbidden in England by statute, 8 & 9 Vict., c. 109, s. 18, (1845) and similar statutes exist in many American States. Unless special provision was made therefor, however, they would not have a retrospective operation upon actions commenced before. Moon *v.* Durden, 2 Exch. R. 22; Doolubdass *v.* Ramloll, 3 Eng. Law & Eq. R. 39.

(*e*) See preceding note. And see *ante*, p. 139 and notes.

(*f*) Wagers as to the mode of playing, or the result of any illegal game, as boxing, wrestling, cockfighting, &c., are void at common law. Brown *v.* Leeson, 2 H. Bl. 43; Egerton *v.* Furzeman, 1 C. & P. 613; Kennedy *v.* Gad, 3 C. & P. 376; Squires *v.* Whisken, 3 Camp. 140; Hunt *v.* Bell, 1 Bing. 1; McKeon *v.* Caherty, 1 Hall, 300; Hasket *v.* Wootan, 1 Nott & McC. 180; Atchison *v.* Gee, 4 McCord, 211. Money lent for the purpose of betting cannot be recovered by the lender of the borrower. Peck *v.* Briggs, 3 Denio, 107; Ruckman *v.* Bryan, Id. 340. And a note given for a gaming debt is void, even in the hands of an innocent indorsee for value. Unger *v.* Boas, 13 Penn. St. 601.

or property, (*g*) so as to make him infamous, or to be libellous or indecent, or to injure his property, or to tend to break the peace. It cannot be believed, in these days, that wagers would be anywhere upheld, against which these objections could be fairly urged; and upon some of these points the authorities are quite clear. (*h*)

5. Of maintenance and champerty.

Maintenance and champerty are offences at common law; and contracts resting upon them are void. But those offences, if not less common in fact, as it may be hoped that they are, are certainly less frequent in their appearance before judicial tribunals than formerly; and recent decisions have considerably qualified the law in relation to them. Still, however, they are offences, and contracts which rest upon them are void. Maintenance in particular seems now to be confined to the intermeddling of a stranger in a suit, for the purpose of stirring up strife and continuing litigation. (*i*) Nor is

(*g*) Such wagers were always void at common law. De Costa *v.* Jones, Cowper, 729, a wager as to the sex of a third person; Philips *v.* Joel, 1 Rawle, 37, a wager that Napoleon Bonaparte would be removed from the island of St. Helena before a certain time; Ditchburn *v.* Goldsmith, 4 Campb. 152, a wager that an unmarried woman would have a child by a certain day; Hartley *v.* Rice, 10 East, 22, a wager that a certain person would not marry within a certain number of years; Gilbert *v.* Sykes, 16 East, 150, a wager on the duration of the life of Napoleon Bonaparte, at a time when his probable assassination was the subject of speculation; Evans *v.* Jones, 5 M. & W. 77, a wager that a certain prisoner would be acquitted on trial of a criminal charge. Some of these cases may have also proceeded upon the ground of *public policy*, and as having an injurious tendency in respect to *public rights*.

(*h*) Wagers upon the result of an election have always been considered as void, on both sides of the Atlantic, as being contrary to sound policy, and tending to impair the purity of elections. Ball *v.* Gilbert, 12 Met. 397; Allen *v.* Hearn, 1 T. R. 56; McAllister *v.* Hoffman, 16 S. & R. 147; Smyth *v.* McMasters, 2 P. A. Browne, 182; Bunn *v.* Riker, 4 Johns. 426; Lansing *v.* Lansing, 8 Johns. 454; Vischer *v.* Yates, 11 Johns. 23; Yates *v* Foot, 12 Johns. 1; Rust *v.* Gott, 9 Cowen, 169; Stoddard *v.* Martin, 1 Rhode Is. 1; Dennistoun *v.* Cook, 12 Johns. 376; Brush *v.* Keeler, 5 Wend. 250; Lloyd *v.* Leisenring, 7 Watts, 294; Wagonseller *v.* Snyder, 7 Watts, 343; Wroth *v.* Johnson, 4 Harr. & McH. 284; Laval *v.* Myers. 1 Bailey, 486; David *v.* Ransom, 1 Greene, 383; Davis *v.* Holbrook. 1 Louis. Ann. 176; Tarleton *v.* Baker, 18 Verm. 9; Commonwealth *v.* Pash, 9 Dana, 31; Machir *v.* Moore, 2 Gratt. 257; Foreman *v.* Hardwick, 10 Ala. 316; Wheeler *v.* Spencer, 15 Conn. 28; Russell *v.* Pyland, 2 Humph. 131; Porter *v.* Sawyer, 1 Harring. 517; Gardner *v.* Nolen, 3 Id. 420; Hickerson *v.* Benson, 8 Missouri, 8.

(*i*) See on this subject, Masters *v.* Miller, 4 T. R. 340; Flight *v.* Leman, 4 Q. B. 883; Bell *v.* Smith, 5 B. & C. 188; Williamson *v.* Henley, 6 Bing.

any one liable to this charge who gives honest advice to go to law, or advances money from good motives to support a suit, or if he stands towards the person who is the party to the suit in any intimate relation, as of landlord, father or son, or master, or husband. (*j*)

Champerty is treated as a worse offence; for by this a stranger supplies money to carry on a suit, on condition of sharing in the land or other property gained by it. And contracts of this sort are set aside both at law and in equity. And any agreements to pay part of the sum recovered, whether by commission or otherwise, on consideration either of money advanced to maintain a suit, or services rendered, or information given, or evidence furnished, come within the definition of champerty. (*k*) And this has also been extended

299. It has been considered maintenance for an attorney to agree to save a party harmless from costs, provided he be allowed one half of the proceeds of the suit in case of success. Masters, *In re*, 4 Dowl. 18. And see Harrington *v.* Long, 2 My. & K. 590. But one may lawfully agree to promote a suit, where he has reasonable ground to believe himself interested, although in fact he is not so. Findon *v.* Parker, 11 M. & W. 675. In Call *v.* Calef, 13 Met. 362, it appeared that A. had an interest in the exclusive use in Manchester, N. H., of a certain patent machine, and B. had an interest in the exclusive use of the same machine in Lowell. S. was using said machine in Manchester, without right. A. gave to B. a power of attorney, authorizing him to take such steps in A.'s name as B. might judge to be necessary or expedient, by suit at law or otherwise, to prevent S. from using, letting, or selling said machine in Manchester, and also authorizing B. to sell to S. the right to use said machine in Manchester. And by a parol agreement between A. and B., B. was to have, as his compensation for his services under said power of attorney, one half of what he should recover or receive of S. B. rendered services under said power, for which he was entitled by said parol agreement to $25. A. afterwards assigned his right to the use of said machine to C., with notice of B.'s claim on A., and with authority to C. to revoke said power of attorney to B., upon paying B. $25. C. promised B. to pay him said sum, and B. consented to the revocation of the power of attorney. B. afterwards brought an action against C. to recover said sum of $25. *Held*, that the parol agreement between A. and B. was not illegal and void on the ground of maintenance and champerty, but was a valid agreement, since the unauthorized use of the patent in either place would diminish the value and profits of the patent in the other, and therefore B. had a direct interest in preventing the violation of the patent right; that C.'s promise to pay B. said sum was on a good and sufficient consideration; and that the action could be maintained.

(*j*) Perine *v.* Dunn, 3 Johns. Ch. 508; Thallhimer *v.* Brinckerhoff, 3 Cow. 647.

(*k*) Stanley *v.* Jones, 7 Bing. 369; Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489, an excellent case on this subject; Byrd *v.* Odem, 9 Ala. 755; Satterlee *v.* Frazer, 2 Sandf. 141; Holloway *v.* Lowe, 7 Porter, 488; Key *v.* Vattier, 1 Ham. 58; Rust *v.* Larue, 4 Litt. 417. It has been held in Kentucky, that a contract by a client to pay his attorney "a sum *equal* to one tenth of the amount recovered," was not void for champerty. Evans *v.* Bell, 6 Dana, 479; Wilhite *v.* Roberts, 4 Dana, 172.

to cover many cases of the purchase of a doubtful title to land, by a stranger, of one not in possession, but of land which he who has possession holds adversely to the title. (*l*)

SECTION XIII.

OF FRAUD.

We have had repeated occasion to remark, that fraud avoids every contract, and annuls every transaction; and to illustrate this principle in its relation to many of the kinds of contracts which we have already considered. But there are some general remarks on the subject of fraud, especially when considered as a defence to an action brought upon a contract, which we would now make, avoiding a repetition of what has been already said, as far as may be.

It is sometimes asserted that the distinction in the civil law between *dolus malus* and *dolus bonus* is unknown to the common law; and it is true that we have no such distinction expressed in words which are an exact translation of the Latin words. But it is also true that the distinction is itself, substantially, a part not only of the common law, but necessarily of every code of human law. For it is precisely the distinction between that kind and measure of craft and cunning which the law deems it impossible or inexpedient to detect and punish, and therefore leaves unrecognized, and

(*l*) This was forbidden by the English stat. 32 Henry 8, c. 9, against buying up pretended titles, which was at an early day enacted in some American States, and in others adopted by practice. See Brinley *v.* Whiting, 5 Pick. 353; Whitaker *v.* Cone, 2 Johns. Cas. 58; Belding *v.* Pitkin, 2 Caines, 147; McGoon *v.* Ankeny, 11 Ill. 558. But see Cresinger *v.* Lessee of Welch, 15 Ohio, 156; Edwards *v.* Parkhurst, 21 Vermont, 472; Dunbar *v.* McFall, 9 Humph. 505. The English statute of 32 Hen. 8, c. 9, on the subject of champerty is not in force in Mississippi. In order, therefore, to avoid a contract on the ground of champerty, the common-law offence must be complete, to constitute which it must not only be proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession; this is especially the case where the land granted was in forest and wild at the time of the grant. Sessions *v.* Reynolds, 7 Sm. & Mar. 132. In many States such a transaction never was considered illegal. See Frizzle *v.* Veach, 1 Dana, 211; Stoever *v.* Whitman, 6 Binn. 416; Hadduck *v.* Wilmarth, 5 N. H. 181.

that worse kind and higher degree of craft and cunning which the law prohibits, and of which it takes away all the advantage from him by whom it is practised.

The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us, and this principle absolutely excludes and prohibits all cunning; if we mean by this word any astuteness practised by any one for his own exclusive benefit. But this would be perfection; and the law of God requires it because it requires perfection; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If therefore the municipal law were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom; either the law would become confessedly, and by a common understanding, powerless and dead; or society would be constantly employed in visiting all its members with punishment; or, if the law annulled whatever violated its principles, by far the greater part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements very different from those which it supplies. And no man has any right to say, that whatever human law does not prohibit, that he has a right to do; for that only is right which violates no law, and there is another law besides human law. Nor, on the other hand, can any one reasonably insist, that whatever one should do or should abstain from doing, this may properly be made a part of the municipal law, for this law must necessarily fail to do all the great good that it can do, and therefore should, if it attempts to do that which, while society and human nature remain what they are, it cannot possibly accomplish.

It follows that a certain amount of selfish cunning passes

unrecognized by the law; that any man may procure to himself, in his dealings with other men, some advantages to which he has no moral right, and yet succeed perfectly in establishing his legal right to them. But it follows also, that if any one carries this too far; if by craft and selfish contrivance he inflicts injury upon his neighbor and acquires a benefit to himself, beyond a certain point, the law steps in, and annuls all that he has done, as a violation of law. The practical question, then, is, where is this point; and to this question the law gives no specific answer. And it is somewhat noticeable, that the common law not only gives no definition of fraud, but perhaps asserts as a principle, that there shall be no definition of it. And the reason of this rule is easily seen. It is of the very nature and essence of fraud to elude all laws, and violate them in fact, without appearing to break them in form; and if there were a technical definition of fraud, and every thing must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell them precisely how to avoid the grasp of the law. Whenever, therefore, any court has before it a case in which one has injured another, directly or indirectly, by falsehood or artifice, it is for the court to determine in that case whether what was done amounts to cognizable fraud. Still, this important question is not left to the arbitrary, or, as it might be, accidental decision of each court in each case; for all courts are governed, or at least directed, by certain rules and precedents, which we will now consider.

In the first place, it is obvious that the fraud must be material to the contract or transaction, which is to be avoided because of it; for if it relate to another matter, or to this only in a trivial and unimportant way, it affords no ground for the action of the court. (*m*) It must therefore relate dis-

(*m*) Thus, it seems that a misrepresentation by a vendor of a horse, as to the place where he bought it, is not such a material fraud as will avoid the sale of the horse. Geddes *v.* Pennington, 5 Dow, 159. In Taylor *v.* Fleet, 1 Barbour, 471, it is said that in order to avoid a contract of sale on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have

tinctly and directly to this contract; and it must affect its very essence and substance. (*n*) But, as before, we must say that there is no positive standard by which to determine whether the fraud be thus material or not. Nor can we give a better rule for deciding the question than this; if the fraud be such, that, had it not been practised, the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties, in the same way, if the fraud had not been practised, it cannot be deemed material. Whether the fraud be material or otherwise seems to be, on the decided weight of authority, a question for the jury, and not a question of law; (*o*) but it is

made the contract upon the faith and credit of such representation. At least, he must so far have relied upon it as that he would not have made the purchase if such representation had not been made. In that case a person about to purchase a farm was ignorant of the actual character and capabilities of the land, and had no means of obtaining such knowledge except by information to be derived from others; and the owner, with a knowledge that the purchaser's object was to obtain an early farm, and that his farm was not as early as the lands lying in the neighborhood, represented to such purchaser "that there was no earlier land anywhere about there," and the latter, relying upon the truth of that representation, made the purchase; and after ascertaining by actual experiment that the land was not what it had been represented to be, he applied to the vendor, within a reasonable time, to rescind the bargain, who refused to do so. *Held*, that this furnished a sufficient ground for the interference of a court of equity to rescind the contract, even though there was no intention on the part of the vendor to deceive the purchaser. As to the necessity of materiality, see Camp *v.* Pulver, 5 Barb. 91.

(*n*) Thus, in Green *v.* Gosden, 4 Scott, N. R. 13, 3 M. & Gr. 446, to a count in debt on a promissory note, the defendant pleaded that the note was obtained from him by the plaintiffs and others in collusion with them, by fraud, covin, and misrepresentation, wherefore the note was void in law; it was *held*, that this plea was not sustained by evidence that the note was given by the defendant and another, as sureties, for a sum advanced to a third person by the plaintiffs, who falsely held themselves out to the world as a society formed and acting under certain rules and regulations; the fraud proved not having such a relation to the particular transaction as to amount to fraud in point of law. So in Vane *v.* Cobbold, 1 Exch. 798, in an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares of £25 each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits; at the time when he executed the deed, the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him. *Held*, that the withholding of the above fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. In Edwards *v.* Owen, 15 Ohio, 500, it was *held* that a special action on the case may be sustained against a debtor, for fraudulently representing himself insolvent, and thereby inducing his creditor to discharge a promissory note for less than its value.

(*o*) Westbury *v.* Aberdein, 2 M. &

obvious that in many cases the jury cannot answer this question without instructions from the court.

In the next place, the fraud must work an actual injury. If it be only an intended fraud, which is never carried into effect, or if all be done that was intended, but the expected consequences do not result from it, the law cannot recognize it. (*p*) And if there be a fraud, and it be actually injurious, the injured party can recover only the damage directly attributable to the fraud, (*q*) and not any increase of this damage

W. 267; Lindenau *v.* Desborough, 8 B. & C. 586; Huguenin *v.* Rayley, 6 Taunt. 186. If the fraud was *material* to the contract, it has been said that it is not necessary that it should have been practised *malo animo*. Moens *v.* Heyworth, 10 M. & W. 155, where Lord *Abinger* said: — "The fraud which vitiates a contract, and gives a party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract; such contracts are, it is true, of a peculiar nature, and have relation as well to the rights of the parties as the event. In the case of a contract for the sale of a public house, if the seller represent by mistake that the house realized more than in fact it did, he would be defrauding the purchaser, and deceiving him; but that might arise from his not having kept proper books, or from non-attention to his affairs; yet, as soon as the other party discovers it, an action may be maintained for the loss consequent upon such misrepresentation, inasmuch as he was thereby induced to give more than the house was worth. That action might be sustained upon an allegation that the representation was false, although the party making it did not know at the time he made it that it was so." And see Lindenau *v.* Desborough, *supra;* Maynard *v.* Rhodes, 5 D. & R. 266; Everett *v.* Desborough, 5 Bing. 503; Elton *v.* Larkins, 5 C. & P. 86. But it has been *held* that if a fact is collateral only, and the statement of it, though made at the time of entering into the contract, is not embodied in it, the contract cannot be set aside merely on the ground that such statement was untrue; it must be shown that the party making it knew it to be untrue, and that the other was thereby induced to enter into the contract. Moens *v.* Heyworth, 10 M. & W. 147. And see McDonald *v.* Trafton, 15 Maine, 225; Wilson *v.* Butler, 4 Bing. N. C. 748.

(*p*) Hemingway *v.* Hamilton, 4 M. & W. 115. Lord *Abinger* there said: — "Suppose a man contracts in writing to sell goods at a certain price, and afterwards delivers them, could the buyer plead, that at the time of the contract the seller fraudulently intended not to deliver them, but to dispose of them otherwise?" In Feret *v.* Hill, 23 Law Times Rep. 158, it was *held* that an intention existing in the mind of *one* of the parties to a contract, to use the thing therein contracted for, in an illegal manner, would not render the contract illegal, although he fraudulently induced the other party to enter into the contract, by stating that he wanted the property for a legal purpose.

(*q*) Per Lord *Ellenborough*, in Vernon *v.* Keys, 12 East, 632. Where an action was brought to recover the value of certain horses, alleged to have died from eating corn mixed with arsenic, which the plaintiff bought from the defendant, it was *held*, that notwithstanding the defendant had fraudulently concealed from the plaintiff the fact that arsenic was so mixed with the corn, yet, if the plaintiff was informed of the fact before he gave it to his horses, he could only recover damages to the value of the corn. Stafford *v.* Newsom, 9 Ired. 507. In Tuckwell *v.* Lambert, 5 Cush.

caused by his own indiscretion or mistake in relation to it. (*r*) And if no damage be caused by the fraud, no action lies. (*s*) Though the law cannot lay hold of a merely intended fraud, yet it will recognize as a fraud a statement which is literally true, but substantially false; for the purpose and effect of the thing will prevail over its form; as if one asserts that another, whom he recommends, has property to a certain amount, knowing all the while, that although he possesses this property, he owes for it more than it is worth. (*t*) And there are indeed cases in which the intention seems to constitute the fraud, and to have the force and effect of fraud. For if one buys on credit, but does not pay, still the title of the goods is in him; but if one buys on credit, intending not to pay, this is an actual fraud, and it avoids the sale entirely, so that no property passes to the purchaser. (*u*) If the question were *res nova*, perhaps it might be doubted whether the

23, the purchaser of a vessel, falsely and fraudulently represented by the seller as eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, and the vessel being afterwards condemned in a foreign port, it was *held*, that the purchaser was entitled to recover his actual damages, occasioned by sending the vessel to sea, not exceeding the value of the vessel.

(*r*) Thus, in Corbett *v.* Brown, 5 C. & P. 363, it was *held* that a tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it.

(*s*) Morgan *v.* Bliss, 2 Mass. 112; Fuller *v.* Hodgdon, 25 Maine, 243; Ide *v.* Gray, 11 Verm. 615; Farrar *v.* Alston, 1 Dev. 69.

(*t*) Corbett *v.* Brown, 8 Bing. 33, 1 Moore & Scott, 85. In this case the defendant's son having purchased goods from the plaintiffs on credit, they wrote to the defendant, requesting to know whether his son had, as he stated, £300 capital, his own property, to commence business with; to which the defendant replied, that his son's statement as to the £300 was perfectly correct, as the defendant had advanced him the money. It was proved that, at the time of the advance, the defendant had taken a promissory note from his son for £300, payable on demand, with interest, which interest was paid. Six months after the communication to the plaintiffs, the defendant's son became bankrupt. *Held*, that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge; and, the jury having found a verdict for him, the court granted a new trial. Denny *v.* Gilman, 26 Maine, 149, also shows that a representation may be literally true, and yet if made with intent to deceive, and it does deceive another to his injury, the author may be liable. It is perhaps on this ground that a second vendee of land, who takes his deed with knowledge of a prior unrecorded deed, cannot hold the estate, although he complies with the *letter* of the statute by first putting his deed on record. See Ludlow *v.* Gill, 1 D. Chip. 49.

(*u*) See Earl of Bristol *v.* Wilsmore, 1 B. & C. 514; Ash *v.* Putnam, 1 Hill, 302; Ferguson *v.* Carrington, 9 B. & C. 59. And see Load *v.* Green, 15 M. & 216.

rule established by these cases is correct. It is clear that if a purchaser makes false representations of his ability to pay, his property, or credit, the sale is void, and no title passes as between the original parties to the contract. (*v*) But it is equally true, that the mere insolvency of the purchaser, and his utter inability to pay for goods when purchased, although well known to himself, will not avoid the sale, if no false representations or means are used to induce the vendor to part with his goods. (*w*)

In the next place, it must appear that the injured party not only did in fact rely upon the fraudulent statement, (*x*) but had a right to rely upon it in the full belief of its truth; for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him from the consequences. (*y*) On the other hand, where a party is obliged to rely upon the statements of another, and not only may, but should repose peculiar confidence in him, this is in the nature of a special trust, and the law is very jealous of a betrayal of this trust, and visits it with great severity. This principle is carried to its utmost extent in the case of persons charged expressly with trusts, either by the *cestui que trust*, or others for him, or by the act of the law; as we have shown in speaking of trustees.

(*v*) Cary *v.* Hotailing, 1 Hill, 311; Andrew *v.* Dieterich, 14 Wend. 31; Johnson *v.* Peck, 1 Wood. & Min. 334; Lloyd *v.* Brewster, 4 Paige, 537.

(*w*) Cross *v.* Peters, 1 Greenl. 378. And see Conyers *v.* Ennis, 2 Mason, 236; and the excellent case of Powell *v.* Bradlee, 9 Gill & Johns. 220.

(*x*) It is not necessary that a vendor should rely *solely* upon the fraudulent statements of the defendant as to the solvency of a third person, in order to give a right of action. It is sufficient if the goods were parted with upon such representations, and would not have been but for them. Addington *v.* Allen, 11 Wend. 375; Young *v.* Hall, 4 Georgia, 95.

(*y*) If therefore the party to whom false statements were made knew them to be false, or suspected them to be so, and did not at all rely upon them; or if the statements consisted of mere expressions of opinion, upon which he had no legal right to rely, the contract is not avoided by the fraudulent intent of the other party. See Clopton *v.* Cozart, 13 S. & M. 363; Anderson *v.* Burnett, 5 How. [Miss.] 165; Connersville *v.* Wadleigh, 7 Blackf. 102. And it is upon this ground that a misrepresentation as to the *legal effect* of an agreement does not constitute such a fraud as will avoid the instrument, since every person is supposed to know the legal effect of an instrument which he signs, and therefore has no right to rely upon the statements of the other party. Lewis *v.* Jones, 4 B. & C. 506; Russell *v.* Branham, 8 Blackf. 277. And see Starr *v.* Bennett, 5 Hill, 303. If the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless. Moore *v.* Turbeville, 2 Bibb, 602; Saunders *v.* Hatterman, 2 Iredell, 32; Farrar *v.* Alston, 1 Dev. 69.

On the same ground, and also because the law especially protects those who cannot protect themselves, all transactions with feeble persons, whether they are so from age, sickness, or infirmity of mind, are carefully watched. The whole law of infancy illustrates this principle; and applies it in many cases by avoiding on this account transactions as fraudulent, which would not have been so characterized had both parties been equally competent to take care of themselves. (*z*)

We have seen that the intention is sometimes the test of fraud; but, on the other hand, this intention is sometimes implied by the law; for it seems now to be quite settled, that if one injures another by statements which he knows to be false, he shall be held answerable, although there be no evidence of gain to himself, or of any interest in the question, or of malice or intended mischief. (*a*) And on the other hand, if the statement be false in fact, and injurious because false, if it were believed to be true by the party making it, it is not a fraud on his part. (*b*) If the statement be in fact

(*z*) Malin *v.* Malin, 2 Johns. Ch. 238; Blachford *v.* Christian, 1 Knapp, 77.

(*a*) Foster *v.* Charles, 6 Bing. 396, 7 Bing. 105. This was an action for making false statements concerning an agent whom the defendant recommended, and knew his statements to be false. *Tindal*, C. J., said:—"It has been urged that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." See also Corbett *v.* Brown, 8 Bing. 33, 1 Moore & Scott, 85, that if a representation is false within the defendant's own knowledge, fraud is to be inferred. And see Polhill *v.* Walter, 3 B. & Ad. 114, as explained in Freeman *v.* Baker, 5 B. & Ad. 797; Hart *v.* Tallmadge, 2 Day, 382. Young *v.* Hall, 4 Geo. 95, is a strong case to show that the defendant need not intend to derive any benefit from his fraud in order to render him liable. See Stiles *v.* White, 11 Met. 356; Weatherford *v.* Fishback, 3 Scam. 170. In Watson *v.* Poulson, 7 Eng. Law & Eq. 585, it was *held*, that if a man tells an untruth, knowing it to be such, in order to induce another to alter his condition, who does accordingly alter it, and thereby sustains damage, the party making the false statement is liable in an action for deceit, although in making the false representation no fraud or injury was intended by him. Murray *v.* Mann, 2 Exch. 538, is to the same effect.

(*b*) Collins *v.* Evans, 5 Q. B. 820; Haycraft *v.* Creasy, 2 East, 92; Rawlings *v.* Bell, 1 C. B. 951; Thom *v.* Bigland, 20 Eng. Law & Eq. 470; Ormrod *v.* Huth, 14 M. & W. 651. In this last case, cotton was sold by sample, upon a representation that the bulk corresponded with the samples, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have

false, and be uttered for a fraudulent purpose, which is in fact accomplished, it has the whole effect of fraud in annulling the contract, although the person uttering the statement did not know it to be false, but believed it to be true. (*c*) If the falsehood be known to the party making the statement, malice or self-interest will be inferred. (*d*) A party will not be held liable as for fraud, if the statement be of a matter collateral to the contract, unless it is proved to have been

been falsely packed, though not by the seller. *Held*, that an action on the case for a false and fraudulent representation was not maintainable, without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. And *Tindal*, C. J., in delivering the judgment of the Court of Exchequer Chamber, said: — "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action. And although the cases may in appearance raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. The rule we have drawn from the cases appears to us to be supported so clearly by the early, as well as the more recent decisions, that we think it unnecessary to bring them forward in review; but to satisfy ourselves with saying that the exception must be disallowed, and the judgment of the Court of Exchequer affirmed." See also Tryon *v.* Whitmarsh, 1 Met. 1; Stone *v.* Denny, 4 Met. 151; Russell *v.* Clark, 7 Cranch, 69; Young *v.* Covell, 8 Johns. 25; Hopper *v.* Sisk, 1 Smith, [Ind.] 102, 1 Carter, 176; Fooks *v.* Waples, 1 Harring. 131; Boyd *v.* Browne, 6 Barr, 316; Lord *v.* Goddard, 13 How. 198; Weeks *v.* Burton, 7 Verm. 67; Ashlin *v.* White, 1 Holt, 387; Shrewsbury *v.* Blount, 2 Mann. & Gr. 475. Many cases, however, seem to hold that a false statement of a material fact, though made *bonâ fide*, will avoid a contract, and especially if the statement be of a fact which the defendant ought to know, and which the other party had a right to expect the defendant did know. See Buford *v.* Caldwell, 3 Missouri, 477; Snyder *v.* Findley, Coxe, 48; Thomas *v.* McCann, 4 B. Monr. 601; Lockridge *v.* Foster, 4 Scammon, 570; Parham *v.* Randolph, 4 How. [Miss.] 435; Dunbar *v.* Bonesteel, 3 Scam. 32; Miller *v.* Howell, 1 Id. 499; Craig *v.* Blow, 3 Stew. 448; Van Arsdale *v.* Howard, 5 Ala. 596; Munroe *v.* Pritchett, 16 Ala. 785; Juzan *v.* Toulmin, 9 Ala. 662.

(*c*) Taylor *v.* Ashton, 11 M. & W. 401.

(*d*) Thus, in Collins *v.* Denison, 12 Met. 549, it was *held*, that in an action for deceit in the sale of a horse, when proof is given that the defendant knowingly made false representations to the plaintiff concerning the horse, at the time of the sale, and that the plaintiff was induced by those representations to buy the horse, and confiding in them did buy him, the jury are authorized and required to find that the defendant made the representations with the intent thereby to induce the plaintiff to buy the horse; and the plaintiff cannot legally be required to give any further proof of such intent of the defendant. See Barley *v.* Walford, 9 Q. B. 197; Boyd *v.* Browne, 6 Barr. 310.

made fraudulently. (*e*) If a misrepresentation be embodied in a contract, it would, for obvious reasons, be deemed more important, and exert a greater influence, than if it lie without the contract, and be connected with it only collaterally, and by force of circumstances. On a ground somewhat similar, a distinction has been drawn between extrinsic and intrinsic circumstances, which may sometimes be of practical use. The rule seems to be, that a concealment or misrepresentation as to extrinsic facts, which by affecting the market value of things sold, or in any such way affects the contract, are not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. (*f*) But it is perhaps enough to say of this, that a fraud relating to external and collateral matters is treated by the law with less severity than one which refers to things internal and essential.

In general, concealment is not in law so great an offence as misrepresentation, (*g*) whatever it may be morally. It

(*e*) See *ante*, p. 267, n. (*n*).

(*f*) Laidlaw *v.* Organ, 2 Wheaton, 195. holds that a vendee is not bound to give information of extrinsic circumstances, which might influence the price of the article, although he knows the same to be exclusively within his own knowledge. See *ante*, vol. 1, p. 461, n. (*l*). See also Blydenburgh *v* Welsh, 1 Baldw. 331; Barnett *v.* Stanton, 2 Ala. 181. But see Frazer *v.* Gervais, 1 Walker, [Miss] 72. See also Hough *v.* Evans, 4 McCord, 169, as to the duty of the vendor to disclose a latent defect, not known to the buyer. But this may arise from the law peculiar to that State, that a sound price implies a sound article.

(*g*) Concealment, to be actionable, must of course be of such facts as the party is bound to communicate. Irvine *v.* Kirkpatrick, 3 Eng. Law & Eq. 17. And see Otis *v.* Raymond, 3 Conn. 413; Van Arsdale *v.* Howard, 5 Ala. 596; Eichelberger *v.* Barnitz, 1 Yeates, 307. A purchaser is not bound to disclose his knowledge of a fraud which makes the title of the vendor to the property better than he himself supposes, where the means of knowledge are equally open to both. Kintzing *v.* McElrath, 5 Penn. St. 467. But see Stevens *v.* Fuller, 8 N. H. 463. In Railton *v.* Mathews, 10 Cl. & Fin. 934, a party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding judge directed the jury that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain. *Held* by the Lords, (reversing the judgment of the Court of Session) that the direction was wrong in point of law. Mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. See Prentiss *v.* Russ, 16 Maine, 30.

is certain, however, that the doctrine of fraud extends to the suppression of the truth in many cases, as well as to the expression of what is false. For although one may have a right to be silent under ordinary circumstances, there are many cases in which the very propositions of a party imply that certain things, if not told, do not exist. (*h*) This is peculiarly the case in contracts of insurance; where the insured is bound to state all facts within his knowledge which would have an influence upon the terms of the contract, and are not known, or may be supposed by him not to be known, to the insurer. (*i*) In these cases, and in others which come within this principle, the *suppressio veri* has the same effect in law as the *expressio falsi.*

The next rule of which we would speak is one which is frequently of very difficult application. It is the rule which

If a broker sell property to a person, knowing it to be subject to the lien of a *fieri facias*, and conceal the fact, and send the party to investigate respecting the encumbrances on the property in a direction whence he knows correct information cannot be obtained, although his false and fraudulent representations are made by actions rather than words, he is liable to an action on the case for deceit. Chisolm *v.* Gadsden, 1 Strobh. 220. But where the defendant, in an action for deceit in the sale of a slave, had been told that he was unsound, but did not believe it, it was *held* that he was not bound to disclose it. Hamrick *v.* Hogg, 1 Dev. 351. As to evidence of fraudulent concealment, see Fleming *v.* Slocum, 18 Johns. 403. In George *v.* Johnson, 6 Humph. 36, it was *held*, that where a party, during a negotiation for the sale of property, stated that the other contracting party must take the property at his own risk, such statement, though negativing a warranty, would not exonerate the party from a liability for a suppression of the truth, or the suggestion of falsehood.

(*h*) Kidney *v.* Stoddard, 7 Met. 252, furnishes an excellent illustration of such a *concealment* as is actionable. There a father by letter recommended his minor son as worthy of credit, &c. He did not not state that he was a minor. A. saw the letter, and on the strength of it trusted the minor for goods for trade to a large amount. The jury were told *that if the father concealed the fact of the minority of the son, with the view of giving him a credit, knowing* or believing that if *that fact had been stated*, he would not have obtained the credit, he was liable in law for the damage A. sustained, and this ruling was affirmed by the whole Court. And see Jackson *v.* Wilcox, 1 Scam. 344. So where it was agreed between the vendors and vendee of goods that the latter should pay 10*s.* per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors; and the payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety; it was *held* that that was a fraud on the surety, and rendered the guaranty void. Pidcock *v.* Bishop, 3 B. & Cr. 605.

(*i*) Lindenau *v.* Desborough, 8 B. & C. 586; Bufe *v.* Turner, 6 Taunt. 338; an excellent case on the subject of concealment. See farther, Clark *v.* Man. Ins. Co. 8 How. 235; Fletcher *v.* Commonwealth Ins. Co 18 Pick. 419; Walden *v.* Louisiana Ins. Co. 12 Louis. 134; Lyon *v.* Commercial Ins. Co. 2 Rob. [Louis.] 266; New York Bowery Ins. Co. *v.* New York Ins. Co. 17 Wend. 359.

discriminates between the mere expression of opinion and the statement of a fact. (*j*) This is often a question for the jury; but, so far as it is matter of law, it may be said that a false representation, in order to have the full effect of fraud, must relate to a substantial matter of fact, and not merely to a matter which rests in opinion, or estimate, or judgment. (*k*) One reason is, the difficulty of proving that a mere statement of opinion is false, for no one can know what another thinks, with any certainty, unless the opinion is of some tangible matter of fact plainly before one's eyes, and then it would generally be a falsehood as to fact. Another reason is, that if one person has an opinion, so may another; and if any one relies on mere opinion, instead of ascertaining facts, it is his own folly. But this rule must not be pressed beyond its reason. For though the statement be in form only of an opinion; yet if that opinion was one on which the other party was justified in relying, either by the relations existing between the parties, (*l*) or by the nature of the case, and it can be made to appear that the opinion expressed was not in fact held, it is not easy to see why this should not be regarded as a false statement of a fact, or rather why it is not, strictly speaking, a false statement of a fact.

(*j*) Where a person, having land for sale, gave an authority in writing to sell it upon certain terms, containing the following clause: — "I will guaranty that there is 45,000,000 feet, board measure, of pine timber on the township; and the purchaser may elect, within thirty days of the purchase, to take it at a survey of all the standing pine timber at one dollar per thousand, or pay the said $45,000;" it was *held* that this did not amount to a representation that there were in fact forty-five millions of feet of timber on the land. Hammatt *v.* Emerson, 27 Maine, 308. So in Sandford *v.* Handy, 23 Wend. 260, it was *held* that a vendor of land is not liable for an expression of opinion of its value; but he is for a false representation as to its location, if the purchaser have not an opportunity at the time of seeing the land. So also he is liable for a misrepresentation as to the cost of the land.

(*k*) Thus, misrepresentations by one contracting party to the other as to the value or quantity of a commodity in market, where correct information on the subject is equally within the power of both parties, with equal diligence, do not, in contemplation of law, constitute fraud. Foley *v.* Cowgill, 5 Blackf. 18. And the same principle was applied in Baily *v.* Merrell, 3 Bulstr. 94, where a carrier brought an action of deceit for representing that a load was only 8 cwt., when it was 20 cwt., whereby two of his horses were killed. Judgment was arrested, because the carrier might have weighed the load himself. — But false representations by a vendor of real estate as to its income or profits will invalidate the sale. Irving *v.* Thomas, 18 Maine, 418; Hutchinson *v.* Morley, 7 Scott, 341. And see Maddeford *v.* Austwick, 1 Sim. 89; Wilson *v.* Wilson, 6 Scott, 540; Dobell *v.* Stevens, 3 B. & C. 623.

(*l*) See Shaeffer *v.* Sleade, 7 Blackf. 178.

The misrepresentation need not be made by the party whom it benefits, in order to constitute a fraud as against him. (*m*) It may be his by adoption; as if a seller knew that a false statement had been made by a third party, which was known to the buyer, and was operating upon his mind, and inducing him to complete the purchase; (*n*) if the seller

(*m*) And it is for this reason that if A. trusts B. upon the fraudulent recommendation of C., A. is not left to his action for damages against C. *for the deceit*, but the fraud of C. invalidates the contract between A. & B., and gives A. the same right to retake the goods as if the fraud had proceeded directly from B. himself. Fitzsimmons *v.* Joslyn, 21 Vermont, 129, is a very interesting and valuable case upon this point. In that case the creditors of a trader, who was insolvent, but who wished to purchase goods, being unwilling to extend to him further credit, told him that they did not like to sell to him if he could buy elsewhere, and gave him the name of another merchant, and authorized him to refer to them. He attempted to purchase of this merchant, and, being asked for references, gave the names of his original creditors, and was told to call again in half an hour. He did call again in the course of the day, and the purchase was effected. No inquiry was made by the vendor of the purchaser, as to his circumstances, nor did he give any assurances whatever relative thereto. On the same day, and after the purchase was effected, the purchaser met one of his original creditors, who told him that he had been called upon by the vendor, and that "he had given as good an account of him as he could and not make himself liable," — "that he had told him that he, the purchaser, was a clever fellow, and was doing a thriving business in Vergennes, and that he, the creditor, had sold him goods, and he paid well, and he was ready to sell him more." At the time of this transaction, the purchaser was in arrears to these same original creditors, to the amount of several hundred dollars each, and their demands had actually been placed in the hands of their attorney at Vergennes, where the purchaser resided, for collection; and, as soon as they learned that this last purchase had been effected, they sent instructions to the attorney to attach the goods, as the property of the purchaser, upon their arrival at the place of destination. This was done, and, as soon as the vendor was informed of the insolvency of the purchaser, which was within a week after the attachment, he demanded the goods of the sheriff, offering to pay freight; but the sheriff refused to surrender them. The attachment was made upon suits in favor of the several original creditors; and it did not appear that either of these creditors, except the one above-mentioned, had made any representation whatever in relation to the matter. And it was *held*, that the purchaser was responsible for the representations made by his creditor, and that the vendor, having been cheated and deceived by means for which the purchaser was legally responsible, might sustain trover against the sheriff to recover the value of the goods so attached.

(*n*) Crocker *v.* Lewis, 3 Sumner, 8. In this case it was *held* that a representation made by A. to B., and communicated by B. to C., who, relying thereupon, contracts with A., by which he is defrauded, shall have the same effect to avoid the contract as if made directly by A. to C. See also Bowers *v.* Johnson, 10 Sm. & M. 169; Hunt *v.* Moore, 2 Barr, 105. So fraudulent representations by A. to B. concerning another's credit or solvency, if communicated to C., who, relying upon them, trusts such third person, may give C. a right of action against A. as much as if the communication had been addressed to C. in person. For the foundation of such an action is not privity of contract, but the author of the fraudulent misrepresentations is guilty of a tort, and is answerable for the damage suffered by any one from such tortious contract. Gerhard *v.* Bates, 20 Eng. Law & Eq. R. 129; Pilmore *v.* Hood, 5 Bing. N. C. 97. In this last case, the defendant being about to sell a public house, falsely represented to B., who hada greed to purchase it, that the receipts were £180 a month;

only permits the buyer to act under this delusion, he makes the falsehood his own, and it is his fraud. (*o*) And it is hardly necessary to repeat, what may be inferred from the general principles of agency, that a principal may commit a fraud by an agent; or may even be affected by the fraud of his agent, although personally honest. (*p*)

We have already seen that, generally, wherever one has a right to rescind a contract, and exercises that right, he must restore the other party to the same condition that he would have been in if the contract had not been made. (*q*) But where the right to rescind springs from discovered fraud, there is an exception to the rule; the defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position; (*r*) but he must rescind as soon as cir-

B. having, to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B., *held*, that an action lay against defendant at the suit of plaintiff. See also Weatherford *v.* Fishback, 3 Scam. 170. But in M'Cracken *v.* West, 17 Ohio, 16, it was *held* that if A. write a letter to B., desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property, and the bearer do not deliver the letter to B., but use it to obtain credit with C., C. cannot maintain an action for deceit against A., though the representations in the letter are untrue.

(*o*) See Warner *v.* Daniels, 1 Wood. & Min. 90; Harris *v.* Delamar, 3 Ired. Eq. 219; Bowers *v.* Johnson, 10 S. & M. 173; Lawrence *v.* Hand, 23 Mississippi, 105.

(*p*) Fitzsimmons *v.* Joslyn, 21 Verm. 129. In this case, *Redfield*, J., ably reviews the decided cases, and pointedly condemns the cases of Cornfoot *v.* Fowke, 6 M. & W. 358; and Langridge *v.* Levy, 2 M. & W. 519, 4 Id. 336, as unsound. See also Fuller *v.* Wilson, 3 Q. B. 58. And see *ante*, vol. 1, pp. 62, 63, and notes.

(*q*) Burton *v.* Stewart, 3 Wend. 236; Thayer *v.* Turner, 8 Met. 550; Kimball *v.* Cunningham, 4 Mass. 502; Perley *v.* Balch, 23 Pick. 283. See also *ante*, p. 192, n. (*o*). But in Stevens *v.* Austin, 1 Met. 557, where B. received the promissory note, &c., of A. for goods which A. fraudulently obtained of him and sold to C., who had knowledge of the fraud; it was *held* that B. might maintain an action of trover for the goods against C. without restoring the note to A. And *Shaw*, C. J., said: — "The question is whether the plaintiff was bound to tender back the note and money he had received before he could bring his action. We think he was not. Not to the defendant; for the plaintiff had received nothing of him. Nor could the defendant raise the question, whether the plaintiff had made restoration to Foster or not. It was *res inter alios*, with which the plaintiff had no concern, and was wholly irrelative to the issue between the parties." Generally an offer to return the property received is as effectual as actually returning it. See Howard *v.* Cadwalader, 5 Blackf. 225; Newell *v.* Turner, 9 Porter, 420. Barnett *v.* Stanton, 2 Ala. 181. But see Carter *v.* Walker, 2 Rich. 40. In Bacon *v.* Brown, 4 Bibb, 91, it was *held* that, in an action for *damages* for deceit in a sale of personal property, it was not necessary to return, or offer to return the property. *Aliter*, if the buyer disaffirms the contract, and sues for *the price paid*.

(*r*) Thus, where a vendor received, in part payment for goods, the note of a third person, and for the other part an order from the vendee on another person, which order was duly paid, it was

cumstances permit, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission. (*s*) In other words, if he rescinds on the ground of fraud, he must do so at once on discovering the fraud; (*t*)

held that the vendor having taken the note upon the false and fraudulent representations by the vendee that the maker was solvent, might return the note to the vendee, and maintain assumpsit for the balance of the amount of the goods sold above the order, without returning the order also, and that the defendant was not entitled to be placed *entirely* in *statu quo*. Martin *v.* Roberts, 5 Cush. 126. Had the vendor sought by replevin to recover *all* the articles sold, *in specie*, perhaps he would have been obliged to return all the consideration received. In Frost *v.* Lowry, 15 Ohio, 200, it was *held*, that if A. obtains goods of B. by false pretences, and gives therefor an accepted draft upon C., an accommodation acceptor, it is not necessary for B. to return the draft to A., in order to rescind the sale, and recover back the goods. And so if a person effect a compromise of his debts, by fraudulent representations, and procure a discharge of the same by paying a percentage thereon, and an action be brought to recover the balance, on the ground of fraud, it is not necessary, as preliminary to the right of recovery, that the plaintiff repay or offer to repay the percentage received. The doctrine of the rescission of contracts does not apply to such a case. Pierce *v.* Wood, 3 Fost. 520.

(*s*) Thus, in Masson *v* Bovet, 1 Denio, 69, it was *held* that where a party has been led to enter into a contract by the fraud of the other party, he may, upon discovering the fraud, rescind the contract, and recover whatever he has advanced upon it, provided he does so at the earliest moment after he has knowledge of the fraud, and returns whatever he has himself received upon it. In that case the defendant, being the plaintiff in a judgment, and about to cause land of the judgment debtor to be sold on execution, fraudulently represented to the plaintiff that the land to be sold was free from any prior incumbrance, when in truth it was subject to older liens to more than its value, and thereby induced him to become the purchaser at the sheriff's sale for a considerable sum, and received from him in payment of his bid the note of a third person held by the plaintiff for a larger sum than the amount bid, giving back his own note for the balance. It was *held* that the plaintiff, who had immediately upon the discovery of the fraud, offered to give up the note received by him, and to assign the certificate of sale, could maintain replevin in the detinet against defendant, for the note so transferred to the defendant by him.

(*t*) Thus, where A. engaged to carry away certain rubbish for B. at a *specified sum*, but found upon commencing his work that B. had made fraudulent representations as to the quantity of rubbish, but nevertheless went on with the work, and then sought to recover more than the sum specified by the contract, it was *held* that by going on with the work he had waived the fraud, and could not recover except upon the special contract. Selway *v.* Fogg, 5 M. & W. 83. Saratoga R. R. *v.* Row, 24 Wend. 74, is very analogous. So if a party defrauded brings an action on the contract to enforce it, he thereby waives the fraud and affirms the contract. Ferguson *v.* Carrington, 9 B. & C. 59; Kimball *v.* Cunningham, 4 Mass. 502. See also Whitney *v.* Allaire, 4 Denio, 554; Lloyd *v.* Brewster, 4 Paige, Ch. R. 537. So if, after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it on a condition which he has no right to exact, he thereby waives the fraud, and cannot set it up in an action on the contract. Blydenburgh *v.* Welsh, Baldw. 331. And see Lamerson *v.* Marvin, 8 Barb. 10. But in Adams *v.* Shelby, 10 Ala. 478, it was *held* that when a party, by fraud, obtains possession of property, under a contract which he had not complied with on his part, an offer by the defrauded party to make a new contract, which is not acceded to, is not a waiver of any right he had against the other for the fraud practised.

for he is not bound to rescind, and any delay, especially if it be injurious to the other party, would be regarded as a waiver of his right. And the same consequences would flow from his continuing to treat as his own the property which came to him by reason of the fraud. (*u*) The mere lapse of time, if it be considerable, goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive. (*v*)

The fraudulent party cannot himself assert his fraud, and claim as his right any advantages resulting from it. To permit him to do so would be to contradict the plainest principles of law. No man can be permitted to found any rights upon his own wrong; (*w*) and it would seem to be an inference from this, that if both parties are in fault, the law will not interfere between them; and this is so, if both parties are actually fraudulent, although the beginning, and the greater fraud, may be on the one side or the other. (*x*)

The general rule, that equity gives relief only where the law cannot, seems not applicable to cases of fraud; for there equity and law have, in some cases at least, a concurrent jurisdiction. But where the injured party confines his claim to damages, he should bring his action at law. If he seeks to set aside the contract entirely on this ground, he must either wait until sued upon the contract, and then interpose this defence at law, or by his bill in equity seek for an injunction, or other proper remedy. There is one distinction,

(*u*) Thus, in Campbell *v.* Fleming, 1 Ad. & El. 40, it was *held*, that if a party be induced to purchase an article by fraudulent representations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own, he cannot recover back the money from the seller. And *semble* that the right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud.

(*v*) See Veazie *v.* Williams, 3 Story, 612. But see Attwood *v.* Small, 6 Clark & Fin. 234; Irvine *v.* Kirkpatrick, 3 Eng. Law & Eq. R. 17.

(*w*) Jones *v.* Yates, 9 B. & C. 532, per Lord *Tenterden;* Taylor *v.* Weld, 5 Mass. 116; Ayers *v.* Hewett, 19 Maine, 281; Hollis *v.* Morris, 2 Harring. 128. Therefore one who gives a fraudulent bill of sale to defraud his creditors cannot set it aside. Bessey *v.* Windham, 6 Q. B. 166; Nichols *v.* Patten, 18 Maine, 231.

(*x*) Warburton *v.* Aken, 1 McLean, 460; Goudy *v.* Gebhart, 1 Ohio St. 262; Nellis *v.* Clark, 20 Wend. 24; Smith *v.* Hubbs, 1 Fairf. 71.

however, which rests upon cases of authority, but is in its own nature so far technical that we have some doubts whether it would now be generally adopted. It is this; that while in a suit on a simple contract, fraud is a good and complete defence, it is not pleadable in bar to an action founded upon a specialty. Some of the courts which have recognized, and perhaps enforced this distinction, have doubted its reasonableness; and in that mingling of law and equity jurisdiction, which has made much progress, and threatens, or promises, to make more, we think this distinction will disappear. (*y*)

(*y*) Any such distinction is denied in Massachusetts. See Hazard *v.* Irwin, 18 Pick. 95. In that case it was *held* that in an action on a contract under seal, in which one of the contracting parties is seeking to enforce the contract against the other, the defendant may plead that the contract was obtained by fraud and imposition. And *Shaw*, C. J., in delivering the judgment of the court, said: — "It was argued on the part of the plaintiff, that whatever might be the effect of the alleged fraud in defence of a suit on a simple contract, such a fraud is not pleadable in bar of an action on a deed or specialty. Several cases are cited in support of this position, from the decisions of the courts of New York, and the point seems to be there so settled by a series of cases. It is a little remarkable, however, that the original case, which constitutes the commencement of this series, is hardly an authority for the point. Dorlan *v.* Sammis, 2 Johns. R. 179, note. The case was debt on bond, for the price of a slave; the defendant relied on the fact that the negro was free, and not the property of the plaintiff, when he sold her; a mere failure of consideration, and with no averment of fraudulent representation. The court ask, 'can a defendant in a court of law get rid of a bond, given on a sale of a chattel, on the ground of failure of consideration? There is no allegation that the plaintiff sold the chattel fraudulently and knowing that he had no title. There is no case in which a bond can be set aside but where the consideration was void in law, or where there was fraud.' But it was afterwards ruled, that fraud cannot be pleaded to a specialty in a court of law, not affecting the execution of the bond itself; but these decisions are founded mainly on the consideration that a more adequate remedy, and one better adapted at once to discover the fraud and to relieve against it, is afforded in equity. In one of the late cases on the subject, Chief Justice *Savage* says: — 'I confess I can see no very good reason why this defence should be excluded from a court of law, and the party sent into a court of equity; but so the point has always been decided.' Stevens *v.* Judson, 4 Wend. 473. But whatever may have been decided elsewhere, we think it has long been a settled rule in Massachusetts, that such a fraud as that set forth in this case is a good defence as well to an action founded on a deed as any other; it is rather acted on as a settled rule, than discussed and decided in any particular case. The cases cited on the argument are cases in which the judgment of the court, upon great consideration, proceeded upon this as a settled rule of law. Bliss *v.* Thomson, 4 Mass. R. 492; Somes *v.* Skinner, 16 Mass. R. 348; Somes *v.* Brewer, 2 Pick. 191. The second of the above cases was a real action, involving a question of title, and the deed, by which the plaintiff conveyed to the defendant, being shown to have been obtained by imposition and fraud, it was held that no title passed. The last of the above cases assumed the same rule to be a settled rule of law; but the case was distinguishable in this, that the first grantee, who obtained the deed from the plaintiff by fraud and imposition, had conveyed the land to a *bonâ fide* purchaser without notice, and

It is said that the law never presumes fraud. If this maxim is regarded merely as an expression of the horror with which the law regards fraud, and its unwillingness to suppose that any one can be guilty of a thing so base, it may be useful. And if it means no more than that the law never presumes fraud without any evidence, as it will sometimes presume payment or title from lapse of time, it is true. But this language is sometimes used when nothing more is meant than that it will not too readily admit fraud upon slight evidence; and when it might be taken to mean, what certainly is not true, that the law will never imply fraud where it is not directly proved, or will not call and treat as constructive fraud that which is not proved to be actual fraud. (z) There is such a phrase in use as legal fraud; meaning not fraud which the law allows, but that which the law for good reasons calls fraud, although neither the dictionary nor morality would give it that name. The doctrine on this subject is not as yet fully settled. It would often be very harsh, and apparently very unjust, to inflict all the consequences of fraud upon one who had made a material misstatement himself, only because of his own error; but it would seem to be still more unjust to permit all the consequences of this false statement to fall and rest on him whose only fault was in believing that one told the truth, who in fact was telling

so it was *held*, that as against him the rule did not apply. The general doctrine was also settled in a case in which the opinion was given by *Parsons*, C. J. It is directly in point. It was on covenant, and the defendant pleaded that it was obtained by fraud and imposition, and the defence was held good. The question as to the relative jurisdiction of courts of law and equity is there considered. The learned judge concludes this part of the case thus: — 'But when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in equity.' Boynton *v.* Hubbard, 7 Mass. 119. The court are all of opinion, that in an action on a contract, though under seal, in which a party is seeking to enforce a contract against the other contracting party, a plea and proof that such contract was obtained by fraud and imposition would constitute a good defence at law, and of course, that had this been a suit against Penman, he might have made this defence at law." To the same effect is Hoitt *v.* Holcomb, 3 Foster, 535.

(z) It is frequently said that courts of equity can act more upon presumptive evidence of fraud than courts of law, but the consideration of that subject in detail is foreign to the object of the present work. See Warner *v.* Daniels, 1 Wood. & Min. 90; 1 Story, Eq. Jur. § 190; Rosevelt *v.* Fulton, 2 Cowen, 129; Neville *v.* Wilkinson, 1 Bro. C. C. 543.

that which was false. In our first volume we have considered this subject somewhat in connection with the law of agency. In general, we should say that where one states what is not true, and injurious consequences result to another, the municipal law, although as we have said, not identical with the law of morality, may well borrow some light from it. The question should be asked, first, whether the statement was made in actual ignorance, and then, whether this ignorance was innocent. Nor would it be enough to give such a falsehood immunity, that the ignorance was not intentional and wilful, if it arose from the unquestionable negligence of the party. Such a case as that would fall within all the reason, and we think all the law, of intentional falsehood. But we go farther; and say that if the ignorance might have been avoided by such care, and such intelligence, and such investigation, as the party making the statement was bound to have and use, then he is responsible for its effects. (*a*) But while we admit that he to whom a deliberate assertion is made, of a fact material to his conduct and his interests, has a right to demand that earnest inquiry and careful scrutiny should precede such assertion, and that in their absence he who makes it must be held responsible for it, we stop short of the doctrine, that whoever asserts what he does not know to be true, is in the same category with him who asserts what he knows to be false. This would be to say that wilful falsehood and mere mistake are the same thing in the law; which cannot be true. Although it may

(*a*) And the case of Adamson *v.* Jarvis, 4 Bing. 66, well illustrates this principle. There the defendant gave the plaintiff, an auctioneer, an order and authority to sell certain goods, representing himself to be the true owner. The plaintiff sold them, and paid over the proceeds to the defendant. The goods proved not to belong to the defendant, and the true owner recovered their value of the auctioneer. The latter was allowed to recover of the defendant for having falsely represented himself to be the true owner, although there was no evidence of any *fraud*, or malice, or knowledge that he was not the true owner. And this was placed on the ground of an implied contract on the part of the defendant to *indemnify* a person for doing what he had employed him to do. And false statements by a vendor of land of the quantity, quality, or boundaries of the premises sold, if material, and relied upon by the other party, will avoid the sale, whether the vendor knew them to be false or not. Warner *v.* Daniels, 1 Wood. & Min. 90; Ainslie *v.* Medlycott, 9 Ves. 13; Shackelford *v.* Handley, 1 A. K. Marsh. 500; Munroe *v.* Pritchett, 16 Ala. 785.

be true that when a loss must fall either on one who misleads or one who is misled, it shall be cast by the law on the first rather than the last, still, this is not because of fraud, actual, constructive, or legal, but simply because each party should bear the consequences of his own acts.

CHAPTER IV.

STATUTE OF FRAUDS.

The Statute of Frauds and Perjuries, passed in the twenty-ninth year of Charles the Second, was intended as an effectual prevention of all the more common frauds practised in society. But a great diversity of opinion as to its effect has existed both in England and in this country. Provisions substantially similar, however, have been made by the States of this country, although in no State, perhaps, is the English statute exactly copied. The questions which have arisen under this statute are almost innumerable; and the great variety of cases leave some of them as yet unsettled. But the statute has had a most important operation upon a great variety of contracts; especially upon those of sale and guaranty; and we must endeavor to present the results of the widely extended adjudications on the subject.

The two sections which peculiarly affect the law of contracts, are the fourth and the seventeenth. By the fourth section it is enacted that "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." By the seventeenth section it is enacted that

"no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is obvious that the most general purpose of these sections is, to permit no party to bind himself except by a written promise, signed by him; because this will secure an exact statement and the best evidence of the terms and conditions of the promise. Let us then first consider what signing is held to be sufficient; then what the agreement must contain and express; and then how it must be framed.

It was decided in the time of Lord *Hardwicke*, that a substantial signing of the agreement was sufficient, although it was not literal and formal. (*b*) Hence, if the agreement be not itself signed, but a letter alluding to and acknowledging the agreement is signed, this is sufficient. (*c*) It is not, how-

(*b*) See Welford *v.* Beazely, 3 Atk. 503.

(*c*) Tawney *v.* Crowther, 3 Bro. C. C. 161, 318; Saunderson *v.* Jackson, 2 B. & P. 238; Shippey *v.* Derrison, 5 Esp. 190; Phillimore *v.* Barry, 1 Campb. 513; Allen *v.* Bennet, 3 Taunt. 170; De Beil *v.* Thompson, 3 Beav. 469; Macrory *v.* Scott, 5 Exch. 907; Gale *v.* Nixon, 6 Cow. 445; Toomer *v.* Dawson, Cheeves, 68. And the letter may be sent to the plaintiff himself, or the acknowledgment may be contained in a letter sent to a third person. Welford *v.* Beazely, 3 Atk. 503. And the indorsement of an unsigned contract of sale by the vendee for the purpose of transfer will operate as a signature. Norman *v.* Molett, 8 Ala. 546. In Jackson *v.* Lowe, 1 Bing. 9, the purchaser of 100 sacks of good English seconds flour, at 45*s.* a sack, wrote to the vendors as follows: "I hereby give you notice, that the flour you delivered to me, in part performance of my contract with you for 100 sacks of good English seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make it into salable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney: "Messrs. L. and L. consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and, unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount." *Held*, that the jury were warranted in concluding that the contract mentioned in the vendors' answer was the same as that particularized in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the 17th section of the statute of frauds. So in Dobell *v.* Hutchinson, 3 Ad. & El. 355, the purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote

ever, enough that the agreement be written by the party him-

and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract. *Held*, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor under the statute of frauds, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor. In Boydell *v.* Drummond, 2 Campb. 157, 11 East, 142, the paper containing the signature was held not to refer with sufficient certainty to the paper containing the terms of the contract.—Where there is a prior insufficient or unsigned written contract, the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though the order for goods be recognized, the terms of the contract are renounced and disaffirmed. Thus, in Cooper *v.* Smith, 15 East, 103, there was a defective memorandum of a bargain for the sale of goods; but the defendant wrote a letter, in which, though he admitted the order, he insisted that the goods had not been delivered in time; and it was *held*, that the letter did not supply the defects of the memorandum, and that it was not competent for the plaintiff to prove, by parol testimony, that it was not stipulated that the goods should be delivered within a given time. And this case was recognized in Richards *v.* Porter, 6 B. & Cr. 437. There A. sent to B., on the 25th of January, an invoice of five pockets of hops, and delivered the hops to a carrier to be conveyed to B. In the invoice, A. was described as the seller and B. as the purchaser of the hops. B. afterwards wrote to A. as follows: "The hops I bought of A. on the 23d January are not yet arrived. I received the invoice; the last were longer on the road than they ought to have been; however, if they do not arrive in a few days, I must get some elsewhere." *Held*, that the invoice and this letter, taken together, did not constitute a note in writing of the contract to satisfy the statute of frauds. To the same effect is Archer *v.* Baynes, 5 Exch. 625. There the defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk; and it was not until after you had examined it, and satisfied yourself both of the quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances, you cannot, therefore, object to fulfil your agreement." The defendant replied as follows: — "I beg to say, the barrels I have received is not the same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them." *Held*, that the letters did not constitute a sufficient note or memorandum, in writing, of the contract, within the 17th section of the statute of frauds. *Alderson*, B., said: — "No doubt if the letter of the plaintiff of the 3d of October, and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract: and the case is in truth governed by Richards *v.* Porter, which was cited in the course of the argument, and in which Lord *Tenterden* gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff.

self, unless he also signs it. (*d*) If, however, he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature; (*e*) but not otherwise. (*f*) The fact of the

It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing." See also Kent *v.* Huskinson, 3 B. & P. 233; Smith *v.* Surman, 9 B. & Cr. 561. — The letter, it seems, must be sent, and the memorandum completed before the action is brought. Bill *v.* Bament, 9 M. & W. 36. In that case, *Martin, arguendo*, contended that a memorandum written after the commencement of the action was sufficient. But *Parke*, B., said: — "With regard to the point which has been made by Mr. *Martin*, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned." But see Fricker *v.* Thomlinson, 1 M. & Gr. 772.

(*d*) Hawkins *v.* Holmes, 1 P. Wms. 770; Selby *v.* Selby, 3 Mer. 2; Hubert *v.* Moreau, 12 Moore, 216; Anderson *v.* Harold, 10 Ohio, 399; Hubert *v.* Turner, 4 Scott, N. R. 486; Bailey *v.* Ogden, 3 Johns. 399. And *a fortiori*, a mere alteration of the instrument in the handwriting of the party sought to be charged, will not be sufficient. Hawkins *v.* Holmes, 1 P. Wms. 770.

(*e*) Thus, in Propert *v.* Parker, 1 Rus. & My. 625, it was *held*, that if the defendant himself write the agreement for the purchase of a leasehold house, and states his own name in the third person, as "Mr. A. B. has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement; the Master of the Rolls observing that "what the statute of frauds requires is, that the party who is sought to be charged shall, by writing his own name, have attested that he has entered into the contract." So in Johnson *v.* Dodgson, 2 M. & W. 653, where the defendant wrote in his own book a memorandum of the contract, and requested the other's signature, this was held to be a sufficient acknowledgment of the contract, and his name was considered as signed, though not appearing at the end, but in the body of the memorandum. And Lord *Abinger* said: — "The statute of frauds requires that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with." Again, in Merritt *v.* Clason, 12 Johns. 102; S. C. *nom.* Clason *v.* Bailey, 14 Id. 484, it was *held* that a memorandum of a contract for the purchase of goods, written by a broker employed to make the purchase, in his book, in the presence of the vendor, the names of the vendor and vendee and

(*f*) Thus, in Stokes *v.* Moore, 1 Cox, 219, where an agreement was made for the renewal of a lease by the defendant to the plaintiff, and the de-

delivery of the instrument, as a promise, would have much weight in determining this question. If one wrote, "In con-

the terms of the purchase being in the body of the memorandum, but not subscribed by the parties, is a sufficient memorandum within the statute of frauds. See also Ogilvie *v.* Foljambe, 3 Mer. 53; Penniman *v.* Hartshorn, 13 Mass. 87; Knight *v.* Crockford, 1 Esp. 190; Saunderson *v.* Jackson, 2 B. & P. 238. And it is not necessary that the name should be written after the writing of the agreement. One may write the contract on a piece of paper on which his name has been previously placed. The delivery of the memorandum shows the intention that the name should operate as a signature. And therefore, where the defendant had written, signed, and delivered a complete memorandum, and afterwards, at the plaintiff's request, made an alteration on the paper, for the purpose of correcting a mistake, and re-delivered the paper to the plaintiff, it was *held* that a signature to this alteration was unnecessary, because authenticated by the signature already on the paper. Black *v.* Gompertz, 7 Exch. 862. And *Pollock*, C. B., said: — "We think that words introduced into a paper signed by a party, or an alteration in it, may be considered as *authenticated* by a signature already on the paper, if it is plain that they were meant to be so authenticated. The act of signing after the introduction of the words is not absolutely necessary."

fendant wrote instructions to an attorney, from whence the same was to be prepaid, in the words following: — "The lease renewed, Mrs. Stokes to pay the king's tax, also to pay Moore £24 a year, half-yearly;" it was *held* that this was not a memorandum signed within the statute. And *Skyner*, C. B., said: — "The question in this case is, whether the written note stated in the pleadings is such an agreement as is within the meaning of the statute of frauds. These are instructions to the attorney for the preparation of the lease. This is no formal signature of the defendant's name, but one term of the instructions is that the rent is to be paid to Moore; and the question is, whether the name so inserted and written by the defendant is a sufficient signing. The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect but those signed in the manner therein specified. It is argued that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is, that it should amount to an *acknowledgment by the party* that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. Here the insertion of the name has not this effect. This memorandum might be drawn subject to additions or alterations, and does not appear to be the final agreement of the parties, and indeed, as far as we can admit parol evidence, it is proved not to be so, for the subject of repairs is not mentioned in the instructions; which shows that the ends of the statute are not to be obtained, if so informal a paper is to be admitted as a written agreement. No case has been adduced in point, but it has been compared to the case of wills, where a name written in the introduction has been considered as a signature, but that seems to me a very different case. The cases on wills have been where the instrument, importing to be the final instrument of the party, has been formally attested, and it is in its nature complete, and the only question has been, whether the form of the statute has been complied with. In the present case I think it is by no means so, and it would be of very dangerous tendency to admit the memorandum to be an agreement within the statute." *Eyre*, B. "I think this cannot be considered such a signature as the statute requires. The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted *so as to have that effect*, I do not think it signifies much in what part of the instrument it is to be found: it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and there the name being generally found in a particular place by the common usage of mankind, it may very probably have the effect of a legal sig-

sideration of, &c., I, A. B., promise to C. D., &c.," and kept the paper in his own hands without signature, it might be supposed that he delayed signing it because he was not ready to make his promise and bind himself. So, if he gave it to the other party to examine and see if it was acceptable to him, or for any similar purpose, it would not be held to be signed by him. But if he gave the instrument written as above distinctly as his promise, then the signature would be held sufficient. Generally, this question could be determined by a construction of the instrument itself, aided however by the *res gestæ* which were admissible as evidence. In some of our States, the word of the statute is not "signed," but "subscribed;" and where this word is used, the signature must be at the end. (*g*) One may sign in the place where a witness usually signs, and under that name, and yet intend to sign as principal, and would of course be so regarded; but it has been also held that if one signs actually as a witness, and with no other intention, yet with a full knowledge of the contents of the paper, and an approbation of them, it would be a sufficient signature to bind the party to the performance of any acts contained in the instrument which were necessarily to be performed by him in order to carry the instrument into effect. (*h*) And where one is in the habit of using instruments with his name printed in them, this will be his signature. (*i*) And so if he writes it in pen-

nature, and extend to the whole; but I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute." See also Cabot *v.* Haskins, 3 Pick. 83; Cowie *v.* Remfry, 10 Jur. 789.

(*g*) Davis *v.* Shields, 24 Wend. 322, 26 Id. 341; Vielie *v.* Osgood, 8 Barb. 130. But see, *contra*, James *v.* Patten, Id. 344.

(*h*) Welford *v.* Beazely, 3 Atk. 503, 1 Ves. 6; Coles *v.* Trecothick, 9 Ves. 234. But see Gosbell *v.* Archer, 2 Ad. & El. 500.

(*i*) Saunderson *v.* Jackson, 3 Esp. 180, 2 B. & P. 238. In Schneider *v.* Norris, 2 M. & S. 286, it was *held* that a bill of parcels in which the name of the vendor was printed, and that of the vendee written by the vendor, was a sufficient memorandum of the contract within the statute of frauds to charge the vendor. And Lord *Ellenborough* said: "I cannot but think that a construction, which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If indeed this case had rested merely on the printed name, unrecognized by, and not brought home to, the party, as having been printed by him, or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching upon the statute to

cil. (*j*) And it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it. (*k*) And he is estopped from denying the

have admitted it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written Norris & Co. with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract. I entertained the same opinion at the trial, and cannot say that it has been changed by the argument. It appears to me, therefore, that the printed name thus recognized is a signature sufficient to take this case out of the statute." *Le Blanc*, J. "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself or by his authority, would afford the same protection as signing."

(*j*) Merritt *v.* Clason, 12 Johns. 102; S. C. *nom.* Clason *v.* Bailey, 14 Johns. 484; Draper *v.* Pattina, 2 Speers, 292; McDowel *v.* Chambers, 1 Strobh. Eq. 347; Geary *v.* Physic, 5 B. & Cr. 234.

(*k*) It has been questioned whether the correct interpretation of the statute does not require the signature of both parties. In Lawrenson *v.* Butler, 1 Sch. & Lefr. 13, Lord *Redesdale* thought that specific performance of a contract should not be enforced against one party unless the other was bound also. "I confess," said he, "I have no conception that a court of equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance, according to the advantage which it might be supposed that they were to derive from it; because otherwise it would follow that the court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance. This is not equity, as it seems to me. If indeed there was a concealment, or an ignorance of the facts, on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement executed *cy pres;* that is, a new agreement is to be made between the parties." And see note to Sweet *v.* Lee, 3 M. & Gr. 462. But it is now well settled that the signature of the party charged in the action satisfies the requirement of the statute. Hatton *v.* Gray, 2 Ch. Cas. 164; Coleman *v.* Upcot, Vin. Abr. tit. Contract and Agreement, (I), pl. 17; Seton *v.* Slade, 7 Ves. 265; Fowle *v.* Freeman, 9 Ves. 351; Martin *v.* Mitchell, 2 Jac. & W. 426; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Egerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169; Schneider *v.* Norris, 2 M. & S. 286; Ballard *v.* Walker, 3 Johns. Cas. 60; Clason *v.* Bailey, 14 Johns. 484; M'Crea *v.* Purmort, 16 Wend. 460; Shirley *v.* Shirley, 7 Blackf. 452; Penniman *v.* Hartshorn, 13 Mass. 87; Douglass *v.* Spears, 2 Nott & M'Cord, 207; Barstow *v.* Gray, 3 Greenl. 409. In Flight *v.* Bolland, 4 Russ. 298, where a bill was filed by an infant for the specific performance of a contract, Sir John *Leach* said: — "No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord *Redesdale* upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said

execution of the instrument on the ground that it wants the signature of the other party. (*l*)

The signature may be made by an agent; (*m*) and the agent may write his own name instead of his principal's; (*n*) and a ratification of the signature would have the same

that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant." In Fenly *v.* Stewart, 5 Sandf. 101, the principle of the decisions upon this point was thus stated by *Mason*, J. "This construction," said he, "has proceeded not on the ground that contracts need not be mutual, but that the statute, in certain enumerated cases, has taken away the power of enforcing contracts, which would otherwise be mutually binding, unless the parties against whom they are sought to be enforced have subscribed some note or memorandum thereof in writing. If a mutual contract is made, and one of the parties to it gives the other a memorandum, in pursuance of the statute, but neglects to take from that other a corresponding memorandum, he has but himself to blame if he is unable to compel its performance, while he is bound to the other party. The difficulty is not that the contract, as originally entered into, is not mutual, but that one of the parties has not the evidence which the statute has made indispensable to its enforcement. It necessarily follows, however, from the provision of the statute, that all inquiry as to whether or not a contract was originally mutual, is immaterial. It may be enforced against the party who has subscribed a note or memorandum of it, though the other party, by not having signed, is, by the express words of the statute, freed from its obligation." By the New York Revised Statutes, Part 2, ch. 7, tit. 1, § 8, it is enacted that "every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed *by the party by whom the lease or sale is to be made.*" For the construction of this section, see Miller *v.* Pelletier, 4 Edw. Ch. 102; Coles *v.* Bowne, 10 Paige, 526; Champlin *v.* Parish, 11 Paige, 405; National Fire Ins. Co. *v.* Loomis, 11 Paige, 431; Worral *v.* Munn, 1 Seld. 229.

(*l*) See cases cited in preceding note.

(*m*) Hawkins *v.* Chace, 19 Pick. 502. And where a testator from illness was unable to write, and his signature was made by having his hand guided, this was held a signature. Wilson *v.* Beddard, 12 Sim. 28. The law, however, will not presume the authority to sign, but the agent must have an authority directly deducible from his employment, or a special authority to do that particular thing. Hawkins *v.* Chace, 19 Pick. 502; Dixon *v.* Broomfield, 2 Chitt. 205; Hodgkins *v.* Bond, 1 N. H. 284; Pitts *v.* Beckett, 13 M. & W. 743. In Graham *v.* Musson, 5 Bing. N. C. 603, the defendant, the purchaser of goods, requested one Dyson, the agent of the seller, to write a note of the contract in the defendant's book. Dyson did so, and signed the note with his own name. *Held*, that such note was not sufficient, under the statute of frauds, to bind the defendant. And per *Vaughan*, J., "The plaintiffs' case fails in their not showing that Dyson was the defendant's agent; it is unnecessary, therefore, to enter into the authorities which have been cited. Dyson was agent for the plaintiffs, and the defendant, in requesting him to make the entry in his book, probably sought to fix the plaintiffs, but not to appoint Dyson as agent for himself." And the agent cannot delegate his authority to sign. Blore *v.* Sutton, 3 Mer. 237; Henderson *v.* Barnewall, 1 Y. & Jer. 387.

(*n*) And in such case parol evidence is admissible to show the authority and bind the principal. Trueman *v.* Loder, 11 Ad. & El. 589. In this case Lord *Denman* said: — "Parol evidence is always necessary to show that the party sued is the person making the contract, and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the ques-

effect as an original authority. (*o*) But the agency must be an agency for this purpose; for it would not be deemed the signature of a principal by an agent, although the party actually writing the name was for some purposes the agent of the other, if it was apparent from the paper itself that it was intended to complete the paper by the actual signature of the principal himself. (*p*) Nor can one of the contracting parties be the agent of the other for this purpose. (*q*) Though an auctioneer (*r*) or broker (*s*) may be for either. And for

tion who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

(*o*) Maclean *v.* Dunn, 4 Bing. 722.

(*p*) Thus, in Hubert *v.* Turner, 4 Scott, N. R. 486, an agreement was drawn by the defendants' agent, which recited in the usual way the names of the contracting parties, and at the end were these words, "as witness our hands;" but it was never in fact signed. *Held*, that it was not sufficient to bind the defendants. And see *supra*, n. (*f*).

(*q*) Wright *v.* Dannah, 2 Campb. 203; Rayner *v.* Linthorne, 2 C. & P. 124. In Farebrother *v.* Simmons, 5 B. & Ald. 333, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased, it was *held*, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. And *Abbott*, C. J., said:—"The question is, whether the writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of Wright *v.* Dannah seems to me to be in point, and fortifies the conclusion at which I have arrived, viz., that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record." But see Bird *v.* Boulter, 4 B. & Ad. 443, in which Farebrother *v.* Simmons is somewhat questioned.

(*r*) It was formerly questioned whether auction sales were within the provisions of the statute of frauds. See Simon *v.* Motivos, 1 Wm. Bl. 599, 3 Burr. 1921. But it is now well settled that they are. Hinde *v.* Whitehouse, 7 East, 558; Blagden *v.* Bradbear, 12 Ves. 466; Kenworthy *v.* Schofield, 2 B. & Cr. 945; Brent *v.* Green, 6 Leigh, 16; Davis *v.* Rowell, 2 Pick. 64; Burke *v.* Haley, 2 Gilm. 614. It was the doctrine of the early cases that the auctioneer's authority to sign for both vendor and purchaser was confined to sales of personal property. Stansfield *v.* Johnson, 1 Esp. 101; Buckmaster *v.* Harrop, 7 Ves. 341; Walker *v.* Constable, 1 B. & P. 306. But it is now well settled that he is to be regarded as the agent of both parties equally in sales of real and of personal property. Coles *v.* Trecothick, 9 Ves. 234, 249; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 B. & Cr. 945; M'Comb *v.* Wright, 4 Johns. Ch. 659; Morton *v.* Dean, 13 Met. 385; Adams *v.* M'Millan, 7 Port. 73; Meadows *v.* Meadows, 3 M'Cord, 458; Cleaves *v.* Foss, 4 Greenl. 1; Alna *v.* Plummer, Id. 258; Anderson *v.* Chick, Bail. Eq. 118. The doctrine formerly prevailed that sales of land by sheriffs, and by masters in chancery under decrees of the court, were not within the statute. Attorney-General *v.* Day, 1 Ves. 218; Blagden *v.* Bradbear, 12 Ves. 466; Tate *v.* Greenlee, 4 Dev. 149. But this also has been since

(*s*) Rucker *v.* Cammeyer, 1 Esp. 105; Hicks *v.* Hankin, 4 Esp. 114; Chapman *v.* Partridge, 5 Esp. 256; Hinde *v.* Whitehouse, 7 East, 569; Hinckley *v.*

the purposes of the fourth and seventeenth sections, the agent may be authorized by parol; although for the first and third,

overruled, and sales of this description are now put upon the same footing with other auction sales. Simonds *v.* Catlin, 2 Caines, 61; Jackson *v.* Catlin, 2 Johns. 248; Ennis *v.* Waller, 3 Blackf. 472; Robinson *v.* Garth, 6 Ala. 204; Barney *v.* Patterson, 6 H. & Johns. 182; Christie *v.* Simpson, 1 Rich. 407; Elfe *v.* Gadsden, 2 Id. 373; Evans *v.* Ashley, 8 Missouri, 177; Alexander *v.* Merry, 9 Id. 514. — It is to be borne in mind that the rule stated in the text, that an auctioneer is to be considered the agent of both parties, rests upon a mere presumption of fact, which may be rebutted by the particular circumstances of the case. Thus, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was *held* that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. And Lord *Denman* said: — "No doubt an auctioneer may be agent for both parties; but here the bargain was, that what the defendant should buy was to be set off against the legacy. We do not overrule the former cases; but we consider them inapplicable. The auctioneer is not *ex vi termini* agent for both parties; that depends upon the facts of the particular case." — The auctioneer's clerk is also regarded as the agent of both parties. Bird *v.* Boulter, 1 Nev. & Man. 313; Frost *v.* Hill, 3 Wend. 386; Smith *v.* Jones, 7 Leigh. 165; Hart *v.* Woods, 7 Blackf. 568. But see *contra*, Meadows *v.* Meadows, 3 M'Cord, 458; Entz *v.* Mills, 1 M'Mullan, 453.

Arey, 27 Maine, 362. But the broker must be known by the party dealing with him to be a broker, acting in the capacity of broker, and not as principal. Shaw *v.* Finney, 13 Met. 453. In that case one Hathaway, a broker, whose business was to buy and sell fish, as well for himself as for others, was authorized by the plaintiffs to buy fish for them, and bargained with the defendant for a quantity of fish, intending to buy for the plaintiffs, but not intimating to the defendant that he was not buying for himself, and made the following written memorandum of the bargain: "October 21, 1846. F. agrees to sell H. his fare of fish, at $2.50 per quintal, as they lay, or to go on flakes one good day, at $2.62½; and to have the refusal of them until Friday evening, 23d instant." Hathaway gave notice to the defendant, before Friday evening, that he would take the fish at $2.62½, they to be put on flakes one good day: the defendant refused to deliver the fish to Hathaway, and the plaintiffs brought this action against him for a breach of the contract. *Held*, that the case was within the statute of frauds, and that the action could not be maintained. And *Wilde*, J., said: — "It is contended for the plaintiffs, that this was a contract between them and the defendant, and that, although Hathaway was employed by the plaintiffs only as their agent, yet, when the defendant dealt with him, he became his agent also, and that his memorandum of the agreement took the case out of the statute of frauds. . . . . Cases were cited from the English authorities, as to similar contracts made by brokers; but these authorities are not applicable to the present case. A broker in England is a known legal public officer, governed by statute; and those who deal with him are to find out who his principals are. He cannot act as principal without violating his oath; and he is also liable to a penalty if he does. 1 Tomlin's Law Dictionary, 274. Hathaway was engaged in buying and selling fish, as well for himself as for others; and it does not distinctly appear whether this purchase was made wholly for the plaintiffs or not. But however this may have been, the defendant did not deal with Hathaway as a broker or agent, but as the contracting party; and if the defendant had himself signed the memorandum, he would not have been liable in this action by the plaintiffs;

which relate to real property, his authority must be in writing. (*t*)

As to the question what the written agreement must contain, the general answer is, all that belongs essentially to the agreement, (*u*) and more than this is not needed. But much

(*t*) Clinan *v.* Cooke, 1 Sch. & Lef. 22; Coles *v.* Trecothick, 9 Ves. 250; Mortlock *v.* Buller, 10 Ves. 292; Graham *v.* Musson, 7 Scott, 769; Waller *v.* Hendon, 2 Eq. Cas. Abr. 50, pl. 26, Vin. Abr. tit. Contract and Agreement, (H), pl. 45; McWhorter *v.* McMahan, 10 Paige, 386; Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 1 Seld. 229; Alna *v.* Plummer, 4 Greenl. 258; Johnson *v.* Somers, 1 Humph. 268.

(*u*) Seagood *v.* Meale, Prec. in Ch. 560; Rose *v.* Cunyughame, 11 Ves. 550; Clerk *v.* Wright, 1 Atk. 12; Montacute *v* Maxwell, 1 P. Wms. 618; Roberts *v.* Tucker, 3 Exch. 632; Archer *v.* Baynes, 5 Exch. 625; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Bailey *v.* Ogden, 3 Johns. 399; Waterman *v.* Meigs, 4 Cush. 497; Morton *v.* Dean, 13 Met. 385; Burke *v.* Haley, 2 Gilm. 614; Adams *v.* M'Millan, 7 Port. 73; Abeel *v.* Radcliff, 13 Johns. 297; Barickman *v.* Kuykendall, 6 Blackf. 21.— It must contain *the names of the parties.* Champion *v.* Plummer, 5 Esp. 240, 4 B. & P. 253. In this case the plaintiff had purchased of the defendant certain merchandise, which the defendant refused to deliver. The only memorandum of the bargain was a short note written by the plaintiff's clerk in a common memorandum book, which was signed by the defendant, but made no mention of the name of the plaintiff. And *Mansfield*, C. J., said: — "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff; there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." And see, to the same effect, Wheeler *v.* Collier, M. & Malk. 123; Jacob *v.* Kirk, 2 M. & Rob. 221; Sherburne *v.* Shaw, 1 N. H. 157; Webster *v.* Ela, 5 N. H. 540; Nichols *v.* Johnson, 10 Conn. 192. — It must contain a full and complete description of the subject-matter of the contract. Kay *v.* Curd, 6 B. Monr. 100. In Nichols *v.* Johnson,

for the contract was in terms a contract with Hathaway." With respect to the entry of the broker in his private book, and the bought and sold notes delivered by him to the parties, the law is not altogether settled. It seems to be settled that the bought and sold notes constitute a sufficient memorandum, without any entry in the broker's book. Dickenson *v.* Silwal, 1 Stark. 128; Rucker *v.* Cammeyer, 1 Esp. 105; Chapman *v.* Partridge, 5 Id. 256; Hawes *v.* Forster, 1 M. & Rob. 368; Goom *v.* Aflalo, 6 B. & Cr. 117; Sivewright *v.* Archibald, 6 Eng. Law & Eq. 286. But for this purpose the bought and sold notes must correspond. Cumming *v.* Roebuck, Holt, N. P. 172; Grant *v.* Fletcher, 5 B. & Cr. 436; Gregson *v.* Ruck, 4 Q. B. 737; Thornton *v.* Kempster, 5 Taunt. 786; Sivewright *v.* Archibald, 6 Eng. Law & Eq. 286; Peltier *v.* Collins, 3 Wend. 459. Where the broker has made an entry of the contract in his book, and has also delivered bought and sold notes to the parties, there has been a conflict of opinion as to whether the entry in the broker's book or the bought and sold notes constitute the contract. But the Court of Queen's Bench, in the recent case of Sivewright *v.* Archibald, 6 Eng. Law & Eq. 286, held that the entry is in such case the binding contract. See further, upon this point, Townend *v.* Drakeford, 1 Car. & Kir. 20; per *Parke*, B., in Pitts *v.* Beckett, 13 M. & W. 746; Heyman *v.* Neale, 2 Campb. 337; Thornton *v.* Charles, 9 M. & W. 802; Thornton *v.* Meux, M. & Malk. 43; Hawes *v.* Forster, 1 M. & Rob. 368.

question has been made whether the consideration is, in this respect, an essential part of the agreement. (*v*) By the early decisions of the English courts, since abundantly confirmed, it was settled in that country that the consideration must be expressed. (*w*) Or, in other words, that an agreement in

10 Conn. 193, "B.'s right in C.'s estate" was held a sufficient description. And see the cases cited in the beginning of this note. — If a price has been agreed upon, that must be stated in the memorandum. Elmore *v.* Kingscote, 5 B. & Cr. 583; Acebal *v.* Levy, 10 Bing. 376; Blagden *v.* Bradbear, 12 Ves. 466; Smith *v.* Arnold, 5 Mason, 414; Ide *v.* Stanton, 15 Verm. 685; Adams *v.* M'Millan, 7 Port. 73. But where a contract is entered into without any agreement as to price, the memorandum is sufficient without any specification of price. Hoadly *v.* M'Laine, 10 Bing. 482. So an order for goods "on moderate terms," is a sufficient memorandum within the statute of frauds. Ashcroft *v.* Morrin, 4 M. & Gr. 450.

(*v*) Minet, *Ex parte*, 14 Ves. 189; Gardom, *Ex parte*, 15 Id. 286; Morris *v.* Stacey, Holt, N. P. 153.

(*w*) Wain *v.* Warlters, 5 East, 10. In this case the defendant was sought to be charged upon the following undertaking: "Messrs. Wain & Co. I will engage to pay you by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed.) Jno. Warlters." It was objected by the defendant, that though the promise, which was to pay the debt of another, was *in writing*, as required by the statute of frauds, yet that it did not express *the consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence; and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum* and void. And the court were of this opinion. Lord *Ellenborough* said: — "In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the statute of frauds has the word *agreement*. And the question is, whether that word is to be understood in the loose, incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise;* but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign

writing, signed by the parties, did not satisfy the requirements of the statute, if it set forth all the promises of the parties, but did not state the consideration for them. In this country, it was doubted whether the consideration was in fact an essential part of the agreement; and in some States the judicial decisions have not only denied this, but the statutes have expressly declared the statement of the consideration unnecessary. (*x*) And if an action be brought on such

another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain." This decision has been sustained in all the subsequent cases in England. See Stadt *v.* Lill, 9 East, 348; Lyon *v.* Lamb, Fell on Guaranties, App. No. 3; Jenkins *v.* Reynolds, 3 Brod. & Bing. 14; Saunders *v.* Wakefield, 4 B. & Ald. 595; Morley *v.* Boothby, 3 Bing. 107; Cole *v.* Dyer, 1 Cr. & Jer. 461; James *v.* Williams, 3 Nev. & Man. 196; Clancy *v.* Piggott, 4 Id. 496; Raikes *v.* Todd, 8 Ad. & El. 846; Sweet *v.* Lee, 3 M. & Gr. 452; Bainbridge *v.* Wade, 16 Q. B. 89. It will be seen that the above decisions depend upon the technical meaning attached to the word "agreement." Therefore, in cases arising under the seventeenth section which does not contain the word "agreement," it has been held that the consideration need not be expressed. Egerton *v.* Mathews, 6 East, 307. And see per *Alderson*, B., in Marshall *v.* Linn, 6 M. & W. 118.

(*x*) The leading case in this country, in opposition to Wain *v.* Warlters, is Packard *v.* Richardson, 17 Mass. 122. In that case the action was brought on an undertaking of the defendants indorsed on a promissory note, and in the words following: "We acknowledge ourselves to be holden as surety for the payment of the within note." And the defendants were held liable. *Parker*, C. J., after stating that part of the fourth section of the statute upon which the question arose, said: — "The obvious purpose of the legislature would seem to be, to protect men from hasty and inconsiderate engagements, they receiving no beneficial consideration; and against a misconstruction of their words by the testimony of witnesses, who would generally be in the employment and under the influence of the party wishing to avail himself of such engagements. To remove this mischief, the promise or engagement shall be in writing and signed; in order that it may be a deliberate act, instead of the effect of a sudden impulse, and may be certain in its proof, instead of depending upon the loose memory or biased recollection of a witness. The agreement shall be in writing: what agreement? The agreement to pay a debt, which he is under no legal or moral obligation to pay, but which he shall be held to pay, if he agrees to do it, and signs such agreement. This appears to be the whole object and design of the legislature; and this is effected without a formal recognition of a consideration; which, after all, is more of a technical requisition than a substantial ingredient in this sort of contracts. And it would seem further, that the legislature chose to prevent an inference that the whole contract or agreement must be in writing; for it is provided that some memorandum or note thereof in writing shall be sufficient. What is this but to say, that if it appear by a written memorandum or note, signed by the party, that he intended to become answerable for the debt of another, he shall be bound, otherwise not. How then is it possible, with these expressions in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound? Yet such is the decision of the Court of King's Bench in the case of Wain *v.* Warlters." And the learned judge then proceeded to a minute examination of the decided cases,

agreement, the consideration may be proved by extrinsic evidence. In other States, however, the English rule has prevailed; (*y*) but it has been held, and is undoubtedly the prevailing rule, that although the consideration be not named as such, if it can be distinctly collected from the whole instrument what it really was, this satisfies the statute. (*z*)

Of the form of the agreement, it need only be said that it must be adequately expressive of the intent and obligation of the parties. It may be on one or many pieces of paper; provided that the several pieces are so connected by mutual

and arrived at the conclusion that the principle declared in Wain *v.* Warlters ought not to be sanctioned. See to the same effect, Sage *v.* Wilcox, 6 Conn. 81; Tufts *v.* Tufts, 3 W. & M. 456; Reed *v.* Evans, 17 Ohio, 128; Gillighan *v.* Boardman, 29 Maine, 79. And see How *v.* Kemball, 2 McLean, 103. See also Mass. Rev. Stat. ch. 74, sec. 2. In some States also the language of the statute has been changed, the word promise or some other word being substituted for the word agreement. And the English doctrine resting upon the technical meaning of the word agreement has consequently been repudiated in those States. Violett *v.* Patton, 5 Cranch, 142; Taylor *v.* Ross, 3 Yerg. 330; Gilman *v.* Kibler, 5 Humph. 19; Wren *v.* Pearce, 4 Sm. & Marsh. 91.

(*y*) Sears *v.* Brink, 3 Johns. 210; Rogers *v.* Kneeland, 10 Wend. 218; Packer *v.* Willson, 15 Id. 343; Bennett *v.* Pratt, 4 Denio, 275; Staats *v.* Howlett, Id. 559; Wyman *v.* Gray, 7 H. & Johns. 409; Elliott *v.* Giese, 7 H. & Johns. 457. Edelen *v.* Gough, 5 Gill, 103; Henderson *v.* Johnson, 6 Geo. 390. And such is now the statute law of New York. See 2 Rev. Stat. part 2, ch. 7, tit. 2, sect. 2.

(*z*) Bainbridge *v.* Wade, 1 Eng. Law & Eq. 236; Steele *v.* Hoe, 14 Q. B. 431; Goldshede *v.* Swan, 1 Exch. 154; Kennaway *v.* Treleavan, 5 M. & W. 498; Chapman *v.* Sutton, 2 C. B. 634; Haigh *v.* Brooks, 10 Ad. & El. 309; Newbury *v.* Armstrong, 6 Bing. 201; Shortrede *v.* Cheek, 3 Nev. & Man. 866; Peate *v.* Dicken, 1 Cr. M. & R. 422; Lysaght *v.* Walker, 5 Bligh, N. S. 1; Jarvis *v.* Wilkins, 7 M. & W. 410; Rogers *v.* Kneeland, 10 Wend. 218, 13 Wend. 114; Marquand *v.* Hipper, 12 Wend. 520; Waterbury *v.* Graham, 4 Sandf. 215; Laing *v.* Lee, 1 Spencer, 337. In the following cases the consideration did not sufficiently appear. Raikes *v.* Todd, 8 Ad. & El. 846; James *v.* Williams, 3 Nev. & Man. 196; Bentham *v.* Cooper, 5 M. & W. 621; Clancy *v.* Piggott, 4 Nev. & Man. 496; Jenkins *v.* Reynolds, 6 Moore, 86; Hawes *v.* Armstrong, 1 Scott, 661; Price *v.* Richardson, 15 M. & W. 539; Wain *v.* Warlters, 5 East, 10; Morley *v.* Boothby, 3 Bing. 107; Saunders *v.* Wakefield, 4 B. & Ald. 595; Jenkins *v.* Reynolds, 3 Br. & Bing. 14. The consideration may be collected from the whole instrument, and may be inferred from its character as well as its terms. It need not therefore be expressed in a guaranty written upon a contemporaneous agreement expressing a consideration; for the agreement and the guaranty of its performance being contemporaneous, the consideration for the one enures to and sustains the other. Bailey *v.* Freeman, 11 Johns. 221. So too if the agreement upon which the contemporaneous guaranty is written itself imports a consideration; as if it be an instrument under seal, or a promissory note. Leonard *v.* Vredenburgh, 8 Johns. 29; Manrow *v.* Durham, 3 Hill, 584. The words "value received" have been held sufficiently to express a consideration. Watson *v.* McLaren, 19 Wend. 557; Douglass *v.* Howland, 24 Wend. 35; Edelen *v.* Gough, 5 Gill, 103. Where the words import either a past or a concurrent consideration, the latter construction will be given. See cases cited at the beginning of this note.

reference or otherwise that there can be no uncertainty as to the meaning and effect of them all, when taken together and viewed as a whole. (*a*) But this connection of several parts cannot be established by extrinsic evidence. (*b*) If there is an agreement on one paper, and something additional on another, and a signature on another paper, that is not a written and signed agreement, unless these several parts require by their own statement the union of the others; for if they may be read apart, or in other connections, evidence is not admissible to prove that they were actually intended to be read together. In general, the written agreement must be certain; but it may be certain in itself; (*c*) that is, it may itself declare the purposes and promises of the agreement definitely; or it may be capable of being made certain by reference to a certain standard. (*d*) If a contract be in its nature entire, and in one part, it satisfies the statute, and in others does not, then it is altogether void. (*e*) But if these

(*a*) Brettel *v.* Williams, 4 Exch. 623; Tawney *v.* Crowther, 3 Bro. C. C. 318; Saunderson *v.* Jackson, 2 B. & P. 238; Forster *v.* Hale, 3 Sumn. 696; Western *v.* Russell, 3 Ves. & Bea. 188; Allen *v.* Bennet, 3 Taunt. 169; Ide *v.* Stanton, 15 Verm. 685; Toomer *v.* Dawson, Cheves, 68.

(*b*) Clinan *v.* Cooke, 1 Sch. & Lef. 22; Brodie *v.* St. Paul, 1 Ves. Jr. 326; Ide *v.* Stanton, 15 Verm. 685; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273.

(*c*) Abeel *v.* Radcliff, 13 Johns. 297; Dodge *v.* Lean, Id. 508; Nichols *v.* Johnson, 10 Conn. 192.

(*d*) Owen *v.* Thomas, 3 My. & K. 353. In this case, an agreement in writing for the sale of a house did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The court held the agreement sufficiently certain, if it could be ascertained, by an inquiry before the master, that the deeds in the possession of the person named referred to the house in question.

(*e*) Cooke *v.* Tombs, 2 Anstr. 420; Lea *v.* Barber, Id. 425, n; Chater *v.* Beckett, 7 T. R. 201; Vaughan *v.* Hancock, 3 C. B. 766; Lexington *v.* Clarke, 2 Vent. 223; Mechelen *v.* Wallace, 7 Ad. & El. 49; Thomas *v.* Williams, 10 B. & Cr. 664; Loomis *v.* Newhall, 15 Pick. 159. In Irvine *v.* Stone, 6 Cush. 508, it was *held* that a contract for the purchase of coals at Philadelphia, and to pay for the freight of the same to Boston, if void by the statute of frauds as to the sale, is void also, and cannot be enforced, as to the freight; though the latter part, if it stood alone, would not be within the statute. The declaration in this case contained the common counts, and also a special count. And *Metcalf*, J., after showing that the plaintiff could not recover on the special count, on the ground of variance, said: — "The remaining question is, whether the good part of the contract before us can be separated from the bad, so that the plaintiff can enforce the part which is good, on his general counts. And we are of opinion that, from the nature of the contract, this cannot be done. It is in its nature entire. The part which respects the transportation stands wholly on the other part which respects the sale, and which is invalid; and both must fall together. The transporting of the coal, apart from the sale of it, was of no benefit to the defendants, and could not have been contemplated by either party as a thing to be paid for or to be done, except in

parts are severable, then it may be good in part and void in part. (*f*)

connection with the sale. The case therefore does not fall within the principle advanced by the counsel for the plaintiff, and sustained by the authorities. The good part of the contract cannot practically be severed from the bad, and separately enforced." So where an agreement was made for the sale by the plaintiff to the defendant of the plaintiff's crop of hemp then on hand, and in like manner his crops to be raised the two succeeding years, it was held that the whole contract came within the statute of frauds, as a contract not to be performed within the space of one year; and that the part of the contract which related to the crop of hemp on hand could not be severed from the rest. So in Thayer *v.* Roch, 13 Wend. 53, it was *held* that a contract made as well for the sale of *real* as of *personal* property, which is entire, founded upon one and the same consideration, and is not reduced to writing, is void, as well in respect to the personal as the real property, the subject of the contract. See also *ante*, vol. 1, p. 379. And see next note.

(*f*) Mayfield *v.* Wadsley, 3 B. & Cr. 357. In Wood *v.* Benson, 2 Cr. & Jer. 94, an action was brought by the clerk of the Manchester Gas Works on the following guaranty, signed by the defendant:— "I, the undersigned, do hereby engage to pay the directors of the Manchester gas works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also agree to pay for all arrears which may be now due." The declaration contained the common counts. It was objected by the defendant, 1st, that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and, 2d, that the agreement being therefore void as to part under the statute of frauds, was void as to the whole. And in support of the second objection, he cited Lea *v.* Barber, Lexington *v.* Clarke, Chater *v.* Beckett, and Thomas *v.* Williams. But the objection was not sustained. *Bayley*, B., said:— "I take it to be perfectly clear that an agreement may be void as to one part, and not of necessity void as to the other. There are many cases in the books where a contract has been held good in part and bad in part. A bond may be good, though the condition is good in part and illegal in part. I am therefore of opinion that it by no means follows that, because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good. In each of the cases referred to for the purpose of showing that the contract, if void in part, was void *in toto*, there was a failure of proof. The declaration in each of those cases stated the entire promise, as well that part which was void as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but that they do not establish that, if you can separate the good part from the bad, you may not enforce such part of the contract as is good. I am, therefore, of opinion that the verdict must stand for the amount of the gas subsequently supplied." To the same effect is Rand *v.* Mather, 7 Law Reporter, N. S. 286, decided in the Supreme Judicial Court of Massachusetts. That was an action for work and labor on three houses belonging to the defendant. The plaintiff began his work under a contract with one Whiston, who was building the houses for the defendant. Whiston failed, and the plaintiff refused to go on with his work. The defendant then told the plaintiff to proceed with his work, and he would pay him for what he had done, as well as for what he should do. The plaintiff then went forward and finished his work. The declaration contained the common counts. It was objected by the defendant that as a part of the contract was clearly within the statute of frauds, the whole must fail. But the objection was overruled, and the court held, in conformity with Wood *v.* Benson, that the plaintiff was entitled to recover for the work done subsequent to the defendant's promise.

Let us now look at the particular clauses of the fourth and seventeenth sections.

The first clause relates to the promise of an executor or administrator to answer damages out of his own estate. In regard to this it has been held, that where an executor gives a bond to the judge of probate to pay debts and legacies, this is an admission of assets, and estops him from denying them; and therefore a promise by him to pay a debt of the testator will be taken to pay it out of sufficient assets, and therefore not to be a promise "to answer damages out of his own estate," and consequently not within the statute; and it need not be in writing. (*g*) In those States in which the written agreement or memorandum should contain the consideration, some new consideration must be shown; but a very slight consideration suffices.

There is said to be this difference between an executor and an administrator. An executor derives his title from the will of his testator, and the office and interest are completely vested in him by the testator's death, and his promise is within the statute, although made before probate of the will. But an administrator derives title from the probate; and if he make a promise in expectation of administration, but before the actual grant, this promise is not within the statute, although he subsequently becomes administrator. (*h*)

The second clause relates to a promise "to answer for the debt, default, or miscarriage of another person." This clause covers all guaranties, and is of great importance in reference to them. Its general effect is, to make it necessary that all collateral promises should be in writing. The distinction between those which are collateral and those which are original has already been considered; and it is sufficient to say in this connection, that only when the promise is distinctly collateral, is it within this clause of the statute. (*i*)

(*g*) Stebbins *v.* Smith, 4 Pick. 97. But see Silsbee *v.* Ingalls, 10 Id. 526.

(*h*) Tomlinson *v.* Gill, Ambl. 330.

(*i*) In the absence of evidence showing distinctly that a promise is collateral, it will be treated as an original promise. This point is well illustrated by the case of Beaman *v.* Russell, 20 Verm. 205. That was an action on a written instrument signed by the defendant, whereby he agreed with the plaintiff to indemnify him for signing, together with three other persons, two promissory notes payable to the Bank of Rutland. It appeared that the notes in question were discounted by the Bank of Rut-

Nor is it then material whether the promise is made before or after the delivery of the goods. (*j*)

From the very definition of a collateral promise, it follows that there must be some one who owes the debt directly. There must exist an original liability, as the foundation for the collateral liability. And one of these liabilities must be entirely distinct from the other. If therefore the creditor trusted to one of the parties more than to the other, but did in fact trust to one together with the other, it is not within the statute. And in ascertaining whether this original and distinct liability exists, and then a collateral one founded upon it, the court will look to the intention of the parties, as they may be inferred from all the circumstances of the case and of the parties. (*k*) At the same time, however, it must be remem-

land; that they were not paid at maturity, and were afterwards paid by the plaintiff. It was objected by the defendant that the promise was within the statute of frauds, as being a collateral promise, and was therefore not binding, because no consideration appeared on the face of the written instrument. But the objection was not sustained. And *Hall*, J., said, "Although the decisions upon the clause of the statute relied upon by the defendant are not all reconcilable with each other, yet it seems agreed in all the cases, that if the promise is not collateral to the liability of some other person to the same party, it is not within the statute. Chit. on Cont. 507; Eastwood *v.* Kenyon, 11 Ad. & El. 438. In this case, unless there was some person liable to indemnify the plaintiff for signing the notes to the Bank of Rutland, other than the defendant, his undertaking was an original and not a collateral one. Does it appear from the writing offered in evidence, either in connection with the notes or without them, that any other person than the defendant was in any manner liable to the plaintiff? If the plaintiff had signed the notes with the other makers of them, as their surety and at their request, the law would have implied a promise from them, to indemnify him. But there is no evidence that he signed as surety. For aught that appears, the liability to the Bank of Rutland might have been incurred for the sole benefit of the defendant, and he might have agreed to indemnify the other signers in the same manner that he did the plaintiff. Besides, there is no proof that the plaintiff signed the note at the request of the other signers. The writing shows that he signed at the request of the defendant, and on his promise to indemnify him; and this fact would be calculated to rebut any presumption that he signed at the request of the others, even if his name had appeared on the notes as surety. In the absence of all evidence that there was a liability of any other person to the plaintiff, to which the defendant's promise could have been collateral, it must be treated as an original promise, not within the statute."

(*j*) Matson *v.* Wharam, 2 T. R. 80; Jones *v.* Cooper, Cowp. 227; Peckham *v.* Faria, 3 Doug. 13; Bronson *v.* Stroud, 2 McMullan, 372.

(*k*) Keate *v.* Temple, 1 B. & P. 158. In this case the defendant, the first lieutenant of his majesty's ship the *Boyne*, applied to the plaintiff, a slop-seller, to furnish the crew with new clothes, saying that he would see him paid at the pay table. The plaintiff having supplied the clothes, and the *Boyne* having been afterwards burnt and the crew dispersed, this action was brought against the defendant to recover the amount. The plaintiff having obtained a verdict for 576*l.* 7*s.* 8*d.*, a new trial was ordered. And *Eyre*, C. J., upon the occasion of making the rule for a new trial absolute, placed

bered that the expressions used by the parties are the first and the most direct evidence of their intention; and the proper effect and construction of the various expressions used in transactions of this kind are well illustrated by Lord *Holt*. (*l*)

It is quite certain, as has been said, that the party *for* whom the promise has been made must be liable to the party *to* whom it is made; (*m*) and it is equally necessary that he

much stress upon the fact that clothes to so large an amount were furnished, and also upon the peculiar relation in which the defendant stood to the crew. "There is one consideration," said he, "independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.* And this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or *of the slop-seller to furnish the goods on his credit*, to so large an amount. I can hardly think that had the *Boyne* not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. . . . . From the nature of the case it is apparent that the men were to pay in the first instance; the defendants words were, 'I will see you paid at the pay table; are you satisfied?' and the answer then was, 'Perfectly so.' The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, whether the slop-man did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum." So in the case of Norris *v.* Spencer, 18 Maine, 324, the court declare that whether the contract of one who engages to be responsible for another, is to be regarded as an original and joint, or as a collateral one, must depend upon the intention of the parties, to be ascertained from the nature of it, and the language used.

(*l*) Watkins *v.* Perkins, 1 Ld. Raym. 224. "If," said he, "A. promise B., being a surgeon, that if B. cure D. of a wound, he will see him paid; this is only a promise to pay if D. does not, and therefore it ought to be in writing by the statute of frauds. But if A. promise in such case that he will be B.'s paymaster, whatever he shall deserve, it is immediately the debt of A., and he is liable without writing." And in Norris *v.* Spencer, 18 Maine, 324, already cited, where a written contract was made in form between two, and signed by the parties named, and *at the same time* a third person added, "I agree to be security for the promisor in the above contract," with his signature, the latter was held as a joint promisor.

(*m*) It is now well settled that, in order to bring a promise within this clause of the statute, it must be made to the party to whom the person undertaken for is liable. "The statute," says *Parke*, B., in Hargreaves *v.* Parsons, 13 M. & W. 561, "applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee*." A promise, therefore, by A. to B. to pay a debt due from B. to C., is not within the statute. This last point was first presented for adjudication in Eastwood *v.* Kenyon, 11 Ad. & El. 438. The facts in that case were that the plaintiff was liable to one Blackburn on a promissory note; and the defendant for a consideration promised the plaintiff to pay and discharge the note to Blackburn. And Lord *Denman* said, "If the promise had been made to Blackburn, doubtless the statute would have applied; it would then have been

continue liable after the making of the promise. In other words, the promise of the party undertaking must not have

strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not the less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one." And see, to the same effect, Hargreaves *v.* Parsons, 13 M. & W. 561; Pratt *v.* Humphrey, 22 Conn. 317; Barker *v.* Bucklin, 2 Denio, 45; Westfall *v.* Parsons, 16 Barb. 645; Preble *v.* Baldwin, 6 Cush. 549. And in New York it has been held that the creditor may sue on such a promise made to his debtor on the ground that he is the person for whose benefit the contract is made. See Barker *v.* Bucklin, 2 Denio, 45. But see *contrà*, Curtis *v.* Brown, 5 Cush. 488. It has been made a question, whether a promise by A. to indemnify B. for guaranteeing a debt due from C. to D. is within the statute. It is clear upon the authorities already cited that such a promise is not within the statute, as being a promise to answer for the debt of C. For that purpose it must have been made to D. to whom the debt was due. And upon this ground it was held, when the question was first presented in Thomas *v.* Cook, 8 B. & C. 728, that such a promise was not within the statute. And *Bayley*, J., said, "A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." And see, to the same effect, Jones *v.* Shorter, 1 Geo. 294; Chapin *v.* Merrill, 4 Wend. 657. But in the more recent case of Green *v.* Cresswell, 10 Ad. & El. 453, a different view was taken of the question, namely, that the person for whom the guaranty is given is under an implied contract to indemnify his guarantor, and that A.'s promise to indemnify is collateral to this, and therefore within the statute. And the same view was adopted in Kingsley *v.* Balcome, 4 Barb. 131. But in other cases it is held that such a contract is not within the statute, even upon this last view. See Holmes *v.* Knights, 10 N. H. 175; Dunn *v.* West, 5 B. Monr. 376; Lucas *v.* Chamberlain, 8 id. 276. The question would seem to depend upon the time when the promise of C., the person for whom the guaranty is given, arises. And this again will depend upon the particular circumstances of the case. If these are such as to authorize the inference that C. made an *actual promise* to indemnify his guarantor at the time when the undertaking of A. was given, or prior thereto, the reasonable presumption is that the promise of A. was intended to be collateral. If, on the other hand, there is nothing in the case from which an *actual promise* by C. can be inferred, and he can only be made liable on a promise raised by operation of law, from B.'s having been compelled to pay money on his account, it would seem to be clear that the promise of A. must be original. For the promise of C. arises upon a subsequent and independent fact, after the promise of A. has become a complete and valid contract.—Upon the principle stated in the text, it was *held* in Bushell *v.* Beavan, 1 Bing. N. C. 103, that a promise by A. that B. should guarantee the debt of C. was not within the statute. In that case the defendant undertook that one Macqueen should guarantee to the plaintiff the payment of certain freight due to him under a charter-party from one Lempill. And *Tindal*, C. J., said, "The contract appears to us not to be a contract to answer for the debt, default or miscarriage of any other person, but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the guaranty, that guaranty would, indeed, have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Lempill did not pay it. But no person could be answerable on the promise to procure his signature but the defendant. Lempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was, therefore, no default of any one for which the defendant made himself liable; but he did so sim-

the effect, prior to its performance, of discharging the party originally liable. Thus, if goods have been furnished by B. to C., and charged to the latter, and A. now becomes responsible for them, and B. thereupon discharges C., looking to A. only, and does this with the knowledge and consent of the parties, this promise of A. is to be regarded as an original promise by way of substitution for the promise of C. which it satisfies and discharges, and not as collateral to the promise of C. (*n*) On the other hand, if the liability of the original party is to continue *after* the performance of the promise, the promise is equally out of the statute. For that cannot properly be called a promise to answer for the debt, default or miscarriage of another person, the performance of which leaves the liability of that other person the same as before. (*o*)

ply upon his own immediate contract. For as to any default of Lempill in paying the freight, the action on the undertaking of the defendant could not be dependent on that event; for it would have been maintainable if the guaranty were not signed at any time after the day on which the defendant engaged it should be given, that is, long before the time when the freight became payable." The same principle was applied in Jarmain *v.* Algar, 2 C. & P. 249. There the defendant promised to execute a bail bond in an action by the plaintiff against one Flack, in consideration that the plaintiff would not cause Flack to be arrested. The defendant's promise was held not to be within the statute, because Flack, the person undertaken for, was not liable. It should be observed, however, that Mr. Justice *Cowen*, in Carville *v.* Crane, 5 Hill, 483, was of opinion that these two cases proceeded upon too literal a construction of the statute.

(*n*) Thus, where the defendant promised to pay the debt of his son, who was in custody on an execution at the suit of the plaintiff, in consideration of his son's being discharged out of custody with the plaintiff's consent, it was held that the promise was not within the statute, because by such discharge the debt of the son was extinguished. So in Curtis *v.* Brown, 5 Cush. 488, 492, *Shaw*, C. J., says, "When, by the new promise, the old debt is extinguished, the promise is not within the statute; it is not then a promise to pay the debt of another, which has accrued, but it is an original contract, on good consideration, and need not be in writing." And see, to the same effect, Bird *v.* Gammon, 3 Bing. N. C. 883; Butcher *v.* Stewart, 11 M. & W. 857; Decker *v.* Shaffer, 3 Ind. 187; Emerick *v.* Sanders, 1 Wisconsin. 77; Draughan *v.* Bunting, 9 Ired. 10; Stanly *v.* Hendricks, 13 id. 86; Bason *v.* Hughart, 2 Texas, 477. And see also *ante*, vol. 1, pp. 188, 191.

(*o*) Stephens *v.* Squire, 5 Mod. 205; Comb. 362. In this case it appeared that an action had been brought against the defendant, an attorney, and two others, for appearing for the plaintiff without a warrant. The cause was carried down to be tried at the assizes; and the defendant promised, in consideration the plaintiff would not prosecute the action, that he would pay ten pounds and costs of suit. And now an action was brought against the defendant upon this promise. Sir Bartholomew *Shower*, for the defendant, objected that the promise was within the statute. *Holt*, C. J., "No. 'tis an original promise, and himself was liable." *Shower*, "What if himself had not been a party, then it were plainly within the statute." *Holt*, C. J., "Put that case when it comes; but if A. saith, do not go on against B. &c., this being to be performed within a year, it will bind him; 'tis like the case of buying goods

So, if the debt for which one engages to answer, is to be kept alive, but to be held for the benefit of the guarantor, the case is out of the statute. Thus, where one purchases the debt of another by his own promise, as if A. promised to pay B. a thousand dollars in three months, and thereupon B. transferred to him C.'s debt to B. for twelve hundred dollars, payable in a year, this certainly is a purchase of a debt, and not a promise to pay the debt of another. (*p*)

It may indeed be stated, as a general rule, that wherever the main purpose and object of the promissor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another. (*q*) There are several

for another man, which is every day's practice. But if A. saith, do not go on against B. and I'll give you ten pounds *in full satisfaction of that action*, that might be within the statute; but here he appears to be a party concerned in the former action." It will be seen that one of the grounds upon which his lordship thought the case to be out of the statute, was that the defendant was one of the parties originally liable. This position will be noticed hereafter. But he was also of opinion that the case would have been out of the statute, though the defendant had not been concerned in the former action, for the reason that it did not appear that the ten pounds were to be paid *in satisfaction*. In other words the liability of the original party would have still continued, notwithstanding the performance of the defendant's promise. This is also, we think, the true ground of the decision in Read *v.* Nash, 1 Wil. 305. It there appeared that one Tuack, the plaintiff's testator, had brought an action of assault and battery against one Johnson. The cause being at issue, the record entered, and just coming on to be tried, the defendant Nash, being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, promised to pay him fifty pounds and costs. It was *held* that the defendant's promise was out of the statute. It has sometimes been supposed that the judgment of the court in this case proceeded upon the ground that a promise to answer for a tort committed by another was not within the statute. And some of the language attributed to the Lord Chief Justice would seem to justify this opinion. But so far as the decision was based upon this ground, it cannot now be regarded as law, as we shall hereafter show.

(*p*) Thus, where A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10*s.* in the pound, in satisfaction of their debts, which they agreed to accept, and to assign their debts to B.; — it was *held*, that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. Anstey *v.* Marden, 4 B. & P. 124.

(*q*) This rule is very clearly stated and fully illustrated by *Shaw*, C. J., in Nelson *v.* Boynton, 3 Metc. 396. He there says, "The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or pro-

classes of cases which may perhaps be more satisfactorily explained upon this principle than upon any other. Thus, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien, this promise is not within the statute. (*r*) The performance of the promise, it is true, will have the effect of discharging the original debtor; but there is no reason to suppose that this constituted, in any degree, the inducement to the promise, or was at all in the contemplation of the promisor. So if A., who is indebted to B., assigns to him in payment a debt due to himself from C., with a guaranty that C. shall pay it to B. when it becomes due, the transaction is not within the statute. For although the undertaking of A. is in form a promise to answer for the debt of another, his object is merely to pay a debt of his own in a particular way. (*s*) So if one of several persons, who are liable jointly

mote some interest or purpose of his own. The former, whether made before, or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promissor."

(*r*) The leading case upon this point is Williams *v.* Leper, 3 Burr. 1886. There one Taylor, a tenant to the plaintiff, being in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed the defendant, as a broker, to sell the effects; and accordingly he advertised a sale. On the morning of the sale the plaintiff came to distrain the goods in the house; whereupon the defendant promised to pay the arrear of rent, if he would desist from distraining; and he did thereupon desist. Upon these facts the court *held* that the defendant's promise was not within the statute. To the same effect is Houlditch *v.* Milne, 3 Esp. 86. There the plaintiff had in his possession certain carriages belonging to one Copey, upon which he had a lien for repairs. The defendant, in consideration that the plaintiff would relinquish his lien, and give up the carriages to him, promised to pay the plaintiff the amount due him. And Lord *Eldon held* the case to be out of the statute, on the principle established by Williams *v.* Leper. And see further, Barrell *v.* Trussell, 4 Taunt. 117; Slingerland *v.* Morse, 7 John. 463; Hindman *v.* Langford, 3 Strobh. 207; Blount *v.* Hawkins, 19 Ala. 100; Allen *v.* Thompson, 10 N. H. 32, cited *ante*, vol. 1, p. 497, n. (*s*); Randle *v.* Harris, 6 Yerg. 508, cited *ante*, vol. 1, p. 498, n. (*u*).

(*s*) Thus, in Johnson *v.* Gilbert, 4 Hill, 178, the defendant, being indebted to one Sherwood in the sum of twenty-five dollars, the plaintiff, at the defendant's request, paid that debt, in consideration whereof the defendant transferred to the plaintiff the note of one Eastman, payable to himself. The defendant also endorsed upon the note a guaranty that it would be paid; and upon this guaranty the action was brought. It was *held* that the case was not within the statute of frauds. *Bronson*, J., said, "The statute of frauds has nothing to do with the case. That only applies where the person making the promise stands in the relation of a

or severally, for the payment of the same debt, promises the creditor to pay the debt, this is not a case within the statute; for although the performance of the promise will have the effect of discharging others, it is to be presumed that the thing in the contemplation of the promisor was his own discharge. Thus, in the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. (*t*) Again, it is now well settled that the guaranty of a factor selling upon a *del credere* commission, is not within the statute. This may be referred to the same principle. Although such a contract "may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." (*u*)

It may be further stated that this clause of the statute does not embrace cases in which the liability to pay the debt of another arises, by operation of law, out of some transaction between the parties, without the aid of any *special promise*. Thus, if A., who is indebted to B., sends money to C. to pay the debt, and C. accepts the trust, he thereby be-

surety for some third person, who is the principal debtor. This was not an undertaking by the defendant to pay the debt of Eastman; but it was an agreement to pay his own debt in a particular way. The plaintiff had, upon request, paid a debt of twenty-five dollars, which the defendant owed to Sherwood, and had thus made himself a creditor of the defendant to that amount. If the matter had not been otherwise arranged, the plaintiff might have sued the defendant, and recovered as for so much money paid for him on request. But the plaintiff agreed to accept payment in a different way, to wit, by the transfer of Eastman's note for the woodwork of a wagon, with the defendant's undertaking that the note should be paid. The defendant, instead of promising that he would pay himself, agreed that Eastman should pay. He might do that, whether Eastman was his debtor or not; and the fact that Eastman was a debtor, does not change the character of the defendant's undertaking; and make it a case of suretyship within the statute of frauds." The same point was decided by the New York Court of Appeals, in Brown *v.* Curtiss, 2 Comst. 225; and Durham *v.* Manrow, id. 533. It is to be observed also that cases of this description are out of the statute, upon the principle established by Eastwood *v.* Kenyon, 11 Ad. & El. 438, and Hargreaves *v.* Parsons, 13 M. & W. 561. See *supra*, n. (*m*).

(*t*) Per Lord *Ellenborough*, in Castling *v.* Aubert, 2 East. 325. And see Files *v.* McLeod, 14 Ala. 611. And see *supra*, n. (*o*).

(*u*) Per *Parke*, B., in Couturier *v.* Hastie, 16 Eng. Law & Eq. 562. It was declared by the Court of Exchequer in this case that such a contract is not within the statute. Such may now, therefore, be considered as the settled doctrine in the English and American law. See *ante*, vol. 1, p. 79, n. (*u*), and p. 500, n. (*w*).

comes liable to B. for the debt of A. (*v*) So if property is delivered to B. clothed with a trust for the payment of the debt of C., and B. consents to receive the property subject to the trust, he thereby becomes liable to pay the debt. (*w*) But

(*v*) Wyman *v.* Smith, 2 Sandf. 331. And see Stocking *v.* Sage, 1 Conn. 519.

(*w*) Drakeley *v.* Deforest, 3 Conn. 272. This was one of the grounds upon which Williams *v.* Leper, 3 Burr. 1886, was decided. For the facts of the case see *supra*, n. (*r*). The plaintiff had a lien upon the goods of his debtor for the payment of his debt; and the defendant, in consideration that the plaintiff would relinquish the goods to him, consented to receive them subject to the lien. Lord *Mansfield*, in delivering his opinion, said, "This case has nothing to do with the statute of frauds. The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He enters to distrain; he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid in the first place. The goods are the *fund*. The question is not between Taylor and the plaintiff. The plaintiff had a *lien* upon the *goods*. Leper was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds." And *Wilmot*, J., said, "Leper became the *bailiff* of the landlord; and when he had sold the goods, the money was the landlord's (as far as 45*l.*) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use." The principle was stated still more pointedly by *Aston*, J., who concurred with the rest of the court upon this ground alone. He said, "I look upon the *goods* here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45*l.* The goods were a *fund between both*; and on that foot I concur." The case of Castling *v.* Auburt, 2 East, 325, proceeded upon the same ground. There the plaintiff held certain policies of insurance which he had effected, as an insurance broker, for the use of one Grayson, and upon the faith of which he had accepted bills for Grayson's accommodation. A loss having happened on the policies in question, and the defendant, who was Grayson's agent, wishing to obtain possession of the policies, in order to receive the amount of the loss from the underwriters, promised, in consideration that the plaintiff would deliver to him the policies, to provide funds for the payment of the plaintiff's acceptances. The policies were accordingly delivered to the defendant, who received from the underwriters more than sufficient to cover the plaintiff's acceptances. Upon these facts the court held the defendant liable. And *Le Blanc*, J., said, "This is a case where one man having a fund in his hands which was adequate to the discharge of certain incumbrances; another party undertook that if that fund were delivered up to him, he would take it with the incumbrances; this, therefore, has no relation to the statute of frauds." It would seem that some of the judges held the defendant liable also upon his *special promise*, upon the other principle established by Williams *v.* Leper, namely, that the main purpose and object of the defendant in making the promise, was not to pay the debt of Grayson, but to subserve a purpose of his own, namely, to get possession of the policies. See *supra*. But if the facts are correctly reported, it would seem difficult to sustain the decision upon this ground. For it appears that the defendant was acting as Grayson's agent, and that he received the policies on Grayson's account and for his benefit. The consideration of the promise, therefore, enured entirely to the benefit of Grayson; and the case, in this view, would seem to come within the decision in Nelson *v.* Boynton, 3 Met. 396, where it was *held* that a promise to pay the note of a third person, which was in suit and secured by an attachment of his property, in consideration of the holder's discontinuing the suit and relinquishing his attachment, was within the statute. It is to be observed, however, that some of the language attributed to Lord *Ellenborough* would seem to indicate that the defendant's name was on bills accepted by the plaintiff, and that

in cases falling within this principle, it is obvious that the party accepting the trust can be made liable only to the extent of the value of the property received, and for debts, with the payment of which the property is charged. (*x*)

It has been made a question whether the words "debt, default or miscarriage," extend to a liability for a mere tort. But it is now well settled that they do. (*y*)

Of the third clause in this section, which declares that "no

his object, therefore, in undertaking to provide funds for their payment, was his own discharge. Thus, his lordship said that the defendant, in making the promise, "had not the discharge of Grayson principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of Grayson would eventually follow." If we may infer from this that the defendant was liable on the bills, the case is relieved from all difficulty. See *supra*, p. 305, n. (*q*). See in further illustration of the principal stated in the text, Edwards *v.* Kelly, 6 M. & S. 204. There, the plaintiff, for rent-arrear, having distrained goods which the tenant was about to sell, agreed with the defendants to deliver up the goods, and to permit them to be sold by one of the defendants for the tenant, upon the defendants' jointly undertaking to pay the plaintiff the rent due; and the goods were accordingly delivered to the defendants. *Held*, that the case was not within the statute. And Lord *Ellenborough* said, "Perhaps this case might be distinguished from that of Williams *v.* Leper, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust. So that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent." And see Bampton *v.* Paulin, 4 Bing. 264.

(*x*) See Thomas *v.* Williams, 10 B. & Cr. 664.

(*y*) The case of Read *v.* Nash, 1 Wil. 305; for some time gave countenance to a contrary opinion. But the doctrine stated in the text was clearly established by Kirkham *v.* Marter, 2 B. & Ald. 613. There, one T. E. Marter had wrongfully and without the license of the plaintiff, ridden the plaintiff's horse, and thereby caused its death. *Held*, that a promise by the defendant to pay the damages thereby sustained, in consideration that the plaintiff would not bring any action against the said T. E. Marter, was within the statute of frauds, and must be in writing. And per *Abbott*, C. J., "The word 'miscarriage' has not the same meaning as the word 'debt,' or 'default;' it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages; and, therefore, in my judgment, falls within the meaning of the word 'miscarriage.'" *Holroyd*, J., "I think the term *miscarriage* is more properly applicable to a ground of action founded upon a tort, than to one founded upon a contract; for in the latter case the ground of action is, that the party has not performed what he agreed to perform; not that he has misconducted himself in some matter for which by law he is liable." And I think that both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract." *Best*, J., "The question is, whether the words of the act are large enough to embrace this case. There is nothing to restrain these words, *default* or *miscarriage*; and it appears to me that each of them is large enough to comprehend this case." And see Turner *v.* Hubbell, 2 Day, 457.

action shall be brought upon any agreement made in consideration of marriage, unless," &c. it has already been said, that promises to marry are not within the statute. (*z*) But all promises in the nature of settlement, advancement, or provision in view of marriage, are within the statute, and must be in writing. (*a*) And a promise to marry after a period longer than one year, has been held to be within the last clause of this section. (*b*)

A parol promise in a marriage, although not itself enforceable by reason of the statute, has been held to be a sufficient consideration, either to sustain a settlement made after marriage in conformity with the promise, (*c*) or a new promise made in writing after marriage. (*d*) And where instructions are given and preparations made for marriage settlements, and the woman is persuaded by the man to marry, trusting to his verbal promise to complete them, it has been thought that equity ought to relieve and compel performance. (*e*)

The principal questions which have arisen under this clause relate to the sufficiency of the written promise. It is enough if contained in a letter; (*f*) or in many letters

(*z*) See *ante*, vol. 1, pp. 546, 547. And see further Clark *v.* Penddleton, 20 Conn. 495; Ogden *v.* Ogden, 1 Bland, 287.

(*a*) See *ante*, vol. 1, p. 554.

(*b*) See *ante*, vol. 1, p. 547.

(*c*) Wood *v.* Savage, Walk. Ch. 471. But see *ante*, vol. 1, p. 554, n. (*t*).

(*d*) Mountacue *v.* Maxwell, 1 Strange, 236; De Beil *v.* Thomson, 3 Beav. 469; S. C. *nom.* Hammersley *v.* De Beil, 12 Cl. & Fin. 45; Surcome *v.* Pinniger, 17 E. L. & E. 212.

(*e*) Per *Story*, J., in Jenkins *v.* Eldridge, 3 Story, 291. But see Montacute *v.* Maxwell, 1 P. Wms. 618. In this case the plaintiff brought a bill against the defendant, her husband, setting forth that the defendant, before her intermarriage with him, promised that she should enjoy all her own estate to her separate use; that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him; but engaged that upon his honor she should have the same advantage of the agreement as if it were in writing, drawn in form by counsel, and executed; whereupon the marriage took effect. To this bill the defendant pleaded the statute of frauds. And the Lord Chancellor said, "In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and engrossed, the parties might refuse to execute them."

(*f*) Seagood *v.* Meale, Prec. in Ch.

which may be read together as parts of a correspondence on one subject. (*g*) But it must be a promise to the other party; and therefore a letter from a father to his daughter, promising her an advancement, which is not shown to the intended husband, nor known to him until after marriage, is denied to be a promise to him within the meaning of the statute. (*h*) So if in such a letter the writer objects to, and endeavors to dissuade from the proposed marriage. (*i*) Whatever be its form, it must amount, substantially, to a promise made to the party, in consideration that he or she will marry a certain other party. (*j*)

The fourth clause provides that "no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," unless, &c. These words are very general, and obviously intended to have a wide operation; but they have been somewhat controlled by construction. Thus, if the question be, whether a contract for the sale of growing crops, be a contract or sale of "any interest concerning lands," it seems to be answered

560; Wankford *v.* Fotherley, 2 Vern. 322; Bird *v.* Blosse, 2 Vent. 361. In this last case a father wrote a letter signifying his assent to the marriage of his daughter with one J. S., and that he would give her 1,500*l.* Afterwards by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his first letter. But subsequently to his writing the last letter, he declared that he would agree to what was proposed in his first letter. The court *held* that the last declaration had set the terms in the first letter up again; and that the undertaking therefore was sufficiently evidenced by writing within the statute of frauds.

(*g*) See *ante*, p. 285, n. (*c*.)

(*h*) Ayliffe *v.* Tracy, 2 P. Wms. 65.

(*i*) Douglass *v.* Vincent, 2 Vern. 202.

(*j*) See Randall *v.* Morgan, 12 Ves. 67; Ogden *v.* Ogden, 1 Bland, 284. In Maunsell *v.* White, 1 J. & La Touche, 539, it appeared that upon a treaty for a marriage between M. & E., a minor, M. communicated to the guardians of E. a letter from his uncle, H., stating that he had, by his will, left his T. estate to M. The guardians resolved that until a suitable settlement should be made by H., of real estate, upon the marriage, in the usual course of settlement, it was not advisable that it should take place. This resolution was communicated to H., who in reply wrote to M.: "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time; and I am confident that I shall never alter it to your disadvantage. I repeat that my T. estate will come to you at my death, unless some unforeseen occurrence should take place;" and desired his letter to be communicated to the guardians. The guardians thereupon consented to the marriage, which was solemnized. The court *held*, 1st, that the letter did not amount to a contract by H. to devise the T. estates to M., and that H. might dispose of them as he pleased by his will; 2nd, that supposing it amounted to a contract, matters connected with the subsequent conduct of M. were "unforeseen occurrences;" and that H. was the sole person to determine whether, upon their happening, he would alter his will.

in conformity with the intention of the parties. If grain be reaped, and stacked or stored in barns, it becomes certainly a chattel. And if it be growing when it is sold, yet if the sale contemplates its severance when grown, and a delivery of it then, distinct from the land, it is in the contemplation of the parties a mere chattel, and is therefore so in the view of the law, so far at least as this statute is concerned. (*k*) And

(*k*) This is the rule declared by the Supreme Judicial Court of Massachusetts, in Whitmarsh *v.* Walker, 1 Met. 313. That was an action founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry trees at a stipulated price; the trees, at the time of the agreement, being growing in the close of the defendant. It was proved at the trial, that the plaintiff paid the defendant in hand the sum of ten dollars, in part payment of the price thereof, and promised to pay the residue of the price on the delivery of the trees, which the defendant promised to deliver on demand; but which promise, on his part, he afterwards refused to perform. The defence was that the contract was for the sale of an interest in land within the meaning of the statute of frauds. *Wilde*, J., said, "We do not consider the agreement set forth in the declaration and proved at the trial, as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete by the payment of the stipulated price. Sainsbury *v.* Matthews, 4 M. & W. 347. Independently of the statute of frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery, without proving that he offered, and was ready to complete the payment of the price; nor could the defendant maintain an action for the price, without proving that he was ready and offered to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the statute of frauds. . . . . We think it therefore clear that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If, for a valuable consideration the defendant contracted to sell the trees, to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it; and if he refused to comply with his agreement, he is responsible in damages." And the case of Nettleton *v.* Sikes, 8 Met. 34, is to the same effect. It was there *held* that an agreement by an owner of land that another may cut down the trees on the land, and peel them, and take the bark to his own use, is not within the statute of frauds. The same view has been taken in several English cases. Thus, in Smith *v.* Surman, 9 B. & Cr. 561, where the plaintiff, being the owner of trees growing on his land, verbally agreed with the defendant, while they were standing, to sell him the timber at so much per foot, *Littledale*, J., said, "I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the fourth section. Those words in that section relate to contracts (for the sale of the fee simple, or of some less interest than the fee,) which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I

we think it is the same with growing grass, or growing trees, or fruits; although some cases take a distinction in this re-

think it would not have given him an interest in the land, within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold." And *Parke*, J., dismissed this question with saying, "The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees till they were cut." Again, in Sainsbury *v.* Matthews, 4 M. & W. 343, where the defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s.* per sack, the plaintiff to have them at digging up time (October), and to find diggers, it was *held* that this was not a contract for the sale of an interest in land, within the meaning of the statute of frauds. And *Parke*, B., said, "This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land; if a tempest had destroyed the crop in the meantime, and there had been none to deliver, the loss would clearly have fallen upon the defendant. It is only a contract for goods to be sold and delivered." And see Evans *v.* Roberts, 5 B. & Cr. 829. It must be admitted, however, that the English courts manifest a strong inclination, in the more recent cases, to hold a contract to be within the statute or not, according as the subject-matter of it consists of *fructus industriales*, or the spontaneous productions of the earth. See Scorell *v.* Boxall, 1 Y. & Jer. 396; Evans *v.* Roberts, 5 B. & Cr. 829; Rodwell *v.* Phillips, 9 M. & W. 501; Jones *v.* Flint, 10 Ad. & El. 753. The same rule was very authoritatively declared in Ireland, in the case of Dunne *v.* Ferguson, Hayes, 540. That was an action of trover for five acres of turnips. It appeared that in October, 1830, the defendant sold to the plaintiff a crop of turnips which he had sown a short time previously. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use; and for which the present action was brought. No note in writing was made of the bargain. It was held that the plaintiff was entitled to recover. And *Joy*, C. B., said, "The general question for our decision is, whether, in this case, there has been a contract for an interest concerning lands, within the second [fourth] section of the statute of frauds; or whether it merely concerned goods and chattels; and that question resolved itself into another, whether or not a growing crop is goods and chattels. The decisions have been very contradictory,—a result which is always to be expected when the judges give themselves up to fine distinctions. In one case, it has been held that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case, the distinction turned upon the hand that was to dig them; so that if dug by A. B., they were potatoes; and if by C. D., they were an interest in lands. Such a course always involves the judge in perplexity, and the cases in obscurity. Another criterion must, therefore, be had recourse to; and fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be *goods;* and they were subject to all the legal consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them; and provides for lands and goods, according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop had been held to be an interest in lands, it would come within the second [fourth] section of the act; but if it were only goods and chattels, then it came within the thirteenth [seventeenth] section. On this, the only rational ground, the cases of Evans *v.* Roberts, 5 B. & Cr. 828; Smith *v.* Surman, 9 B. & Cr. 561, and Scorell *v.* Boxall, 1 Y. & Jer. 396, have all been decided. And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must

spect between what grows spontaneously, and that which man has planted or sown and cultivated, holding that only emblements, or what might be emblements, are to be considered as chattels, while the spontaneous growth of the land remains a part of it; at least, until it is fully ripe and ready for removal. (*l*) If by the same contract these things and the land on which they stand are sold, it is not a sale of land and chattels, for then they pass with the realty as a part of it, and the contract in reference to them is as much within this clause of the statute as it is in reference to the land itself. (*m*) Such are the views expressed, as we think, by the highest authorities, and supported by the best reasons. But there is some uncertainty and conflict on the subject. And, perhaps, it may be stated as a general rule, that if the parties appear to consider the land merely as a place of deposit or storing for the vegetable productions, or as a means by which for a time they may be improved, they are so far disconnected from it, that they may be sold as chattels, and are not within the statute. And it is only when the parties connect the land and its growth together, either by express words or by the nature of the contract, that the growth of the land comes within the statute. It seems to be settled that a promise to pay for improvements on land, is only a promise to pay for work and labor, or materials, and not for an interest in lands, and therefore need not be in writing. (*n*) And a contract for the sale of removable fixtures is not within the statute. (*o*)

rule the points saved for the plaintiff." Such also is the settled rule in New York. Green *v.* Armstrong, 1 Denio, 550; Bank of Lansingburgh *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613. For other cases upon the sale of growing crops, see Anonymous, 1 Ld. Raym. 182; Poulter *v.* Killingbeck, 1 B. & P. 397; Waddington *v.* Bristow, 2 B. & P. 452; Crosby *v.* Wadsworth, 6 East, 602; Parker *v.* Staniland, 11 id. 362; Newcomb *v.* Ramer, 2 Johns. 421, n. (*a*); Austin *v.* Sawyer, 9 Cow. 39; Warwick *v.* Bruce, 2 M. & S. 205; Emmerson *v.* Heelis, 2 Taunt. 38; Mayfield *v.* Wadsley, 3 B. & Cr. 357; Teal *v.* Auty, 2 Br. & Bing. 99; Knowles *v.* Michel, 13 East. 249; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Erskine *v.* Plummer, 7 Greenl. 447.

(*l*) See preceding note.

(*m*) Thayer *v.* Rock, 13 Wend. 53; Mayfield *v.* Wadsley, 3 B. & Cr. 357; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Michelen *v.* Wallace, 7 Ad. & El. 49; Vaughan *v.* Hancock, 3 C. B. 766; Forquet *v.* Moore, 16 E. L. & E. 466. But this rule must be confined to cases where the contract for the land and the crops standing upon it, is *entire*. See *ante*, p. 311, n. (*k*).

(*n*) Frear *v.* Hardenbergh, 5 Johns. 272; Benedict *v.* Beebee, 11 Johns. 145; Lower *v.* Winters, 7 Cow. 263.

(*o*) Bostwick *v.* Leach, 3 Day, 476; Hallen *v.* Runder, 1 Cr. M. & Ros. 266.

A mere license to use land, as to stack hay or grain upon it for a time, is not an interest in lands within the statute. (*p*) But that only is a license in this respect, which, while it is an excuse for a trespass as long as it is not revoked, conveys no rights over the land, and subjects it to no servitude. For any contract of which the effect is to give to one party an easement on the land of another, is within the statute. (*q*) But if a landlord agrees with a present lessee to make further improvements on the estate, for an additional compensation, this has been held to be an agreement collateral only to the land, and not within the statute. (*r*)

Generally, in this country, and in England, the stock of a corporation is personal property; (*s*) and this is so, even though the whole property of the corporation be real, and the whole of its business relate to the care of real estate; if it be the surplus profit alone that is divisible among the individual members. (*t*)

But where lands are vested, not in the corporation, but in the individual shareholders, and the corporation has only the power of management, in that case the stock or shares are real property. (*u*) And it would follow that a contract for the sale of this stock, or for these shares, is within the statute, as a contract for the sale of an interest in lands.

When a contract, originally within this clause of the statute, has been executed, and nothing remains to be done but payment of the consideration, this may be recovered notwithstanding the statute. (*v*) But in such case the declara-

(*p*) Carrington *v.* Roots, 2 M. & W. 248; Riddle *v.* Brown, 20 Ala. 412; Mumford *v.* Whitney, 15 Wend. 380; Whitmarsh *v.* Walker, 1 Met. 313; Woodward *v.* Seely, 11 Ill. 157; Stevens *v.* Stevens, 11 Met. 251; Haughtaling *v.* Haughtaling, 5 Barb. 379; Wolfe *v.* Frost, 4 Sandf. Ch. 72; Dubois *v.* Kelly, 10 Barb. 496. And see *ante*, p. 23, n. (*e.*)

(*q*) See cases cited in preceding note.

(*r*) Hoby *v.* Roebuck, 7 Taunt. 157; Donellan *v.* Read, 3 B. & Ad. 899.

(*s*) Bligh *v.* Brent, 2 Y. & Col. 268; Tippets *v.* Walker, 4 Mass. 595. But see, *contra*, Welles *v.* Cowles, 2 Conn. 567.

(*t*) Bligh *v.* Brent, 2 Y. & Col. 268.

(*u*) Id.

(*v*) Thus, if a verbal contract is made for the conveyance of land, and the land is conveyed accordingly, the statute of frauds furnishes no defence to an action brought to recover the price. Brackett *v.* Evans, 1 Cush. 79; Preble *v.* Baldwin, 6 id. 549; Linscott *v.* McIntire, 15 Maine, 201; Thayer *v.* Viles, 23 Verm. 494; Morgan *v.* Bittenberger, 3 Gill, 350; Thomas *v.* Dickinson, 14 Barb. 90; Gillespie *v.* Battle, 15 Ala. 276. And see Moore *v.* Ross, 11 N. H. 555; Holbrook *v.* Armstrong, 1 Fairf. 31; per *Tindal*, C. J., in Souch *v.* Strawbridge, 2 C. B. 808.

tion must be framed, not upon the original contract, but upon the contract implied by law from the plaintiff's performance. (*w*)

The fifth clause of this section declares that "no action shall be maintained upon any agreement that is not to be performed within the space of one year from the making thereof, unless," &c. Much the most important rule in reference to this section, we have had occasion to allude to already. (*x*) It may be stated thus. If the executory promise be capable of entire performance within one year, it is not within this clause of the statute. The decision of this question does not seem to depend entirely upon the understanding or intention of the parties. They may contemplate as probable a much longer continuance of the contract, or a suspension of it and a revival after a longer period; it may in itself be liable to such continuance and revival; and it may in this way be protracted so far that it is not in fact performed within a year; but if when made, it was in reality capable of a full and bonâ-fide performance within the year, without the intervention of extraordinary circumstances, then it is to be considered as not within the statute. (*y*)

(*w*) Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 id. 283.

(*x*) See *ante*, vol. 1, p. 93, n. (*e*).

(*y*) The cases which have arisen upon this clause of the statute may be conveniently arranged in three classes. 1. Where *by the express agreement of the parties*, the performance of the contract is not to be completed within one year. 2. Where it is evident, *from the subject-matter of the contract*, that the parties had in contemplation a longer period than one year as the time for its performance. 3. Where the time for the performance of the contract is made to depend upon some contingency, which may or may not happen within one year. Cases falling within the first class are clearly within the statute. Thus, in Bracegirdle *v.* Heald, 1 B. & Ald. 722, it was held that a contract made on the 27th of May, for a year's service, to commence on the 30th of June following, was within the statute. So, where A., on the 20th of July, made proposals to B. to enter his service as bailiff for a year, and B. took the proposals and went away, and entered into A.'s service on the 24th of July, it was held that this was a contract on the 20th, and so not to be performed within the space of one year from the making, and within the 4th section of the statute of frauds. Snelling *v.* Lord Huntingfield, 1 Cr. M. & Ros. 20. Again, in Birch *v.* The Earl of Liverpool, 9 B. & Cr. 392, it was held that a contract whereby a coachmaker agreed to let a carriage for a term of 5 years, in consideration of receiving an annual payment for the use of it, was within the statute. And see Lower *v.* Winters, 7 Cow. 263; Derby *v.* Phelps, 2 N. H. 515; Hinckley *v.* Southgate, 11 Verm. 428; Squire *v.* Whipple, 1 id. 69; Foote *v.* Emerson, 10 id. 338; Pitcher *v.* Wilson, 5 Missouri, 46; Drummond *v.* Burrell, 13 Wend. 307; Shute *v.* Dorr, 5 id. 204; Lockwood *v.* Barnes, 3 Hill, 130; Sweet *v.* Lee, 4 Scott, N. R. 77; Giraud *v.* Richmond, 2 C. B. 835; Lapham *v.* Whipple, 8 Mete. 59; Tuttle *v.* Swett, 31 Maine, 555; Wilson *v.* Martin, 1 Denio, 602; Pitkin *v.* The Long Is-

The same observation may be made in respect to the clause of which we are now treating, that we have already

land R. R. Company, 2 Barb. Ch. 221. And such a contract will not be taken out of the statute by the mere fact that it may be put an end to within a year by one of the parties, or a third person. Thus, in Harris *v.* Porter, 2 Harring. 27, where the defendant, a mail contractor, made a sub-contract with the plaintiff to carry the mail for more than a year, it was contended that the contract was not within the statute, because the contract between the defendant and the postmaster-general reserved to the latter the power to alter the route, and thus put an end to the contract at any time; it might, therefore, be terminated within a year, and did not necessarily reach beyond it. But the Court said, "This was a contract which could not possibly be *performed* within one year; by its terms it was to continue *four* years. And though it might be annulled or put an end to by the postmaster-general within the year, it still falls within the act as an agreement which, according to its terms, is not to be performed within the space of one year." Birch *v.* the Earl of Liverpool, 9 B. & Cr. 392, is to the same effect. But if it is merely optional with one of the parties whether he shall perform the contract within a year or take a longer time, the contract is not within the statute. Therefore, it has been held that an agreement that one party may cut certain trees on the land of the other, at any time within ten years, is not within the statute. Kent *v.* Kent, 18 Pick. 569. So, where the plaintiff and defendant entered into a contract by which the plaintiff agreed to labor for the defendant for one year, but without fixing any definite time for the labor to commence, it was held that the contract was not within the statute, for the plaintiff had a right to commence immediately. Russell *v.* Slade, 12 Conn. 455. And see Linscott *v.* McIntire, 15 Maine, 201; Plimpton *v.* Curtiss, 15 Wend. 336. In regard to the second class of cases, namely, those where it is evident, *from the subject-matter of the contract*, that the parties had in contemplation a longer period than one year as the time for its performance, although there is no express agreement to that effect, there has been more doubt, but it is now settled that they are within the statute. The leading case of this class is Boydell *v.* Drummond, 11 East. 142. In this case the plaintiff had proposed to publish by subscription a series of large prints from some of the scenes in *Shakespeare's* plays, after pictures to be painted for that purpose, under the following conditions, among others, namely, that seventy-two scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints; and that one number at least should be *annually* published after the delivery of the first. The defendant became a subscriber. And the court *held* that the contract was within the statute. The same point is well illustrated by the case of Herrin *v.* Butters, 20 Maine, 119. For the facts of that case see *ante*, vol. 1, p. 93, n. (*e*.) *Whitman*, C. J., in delivering the opinion of the court, said, "It is urged, that the defendant might have cleared up the land, and have seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility; but whether so or not must depend upon a number of facts, of which the court are uninformed. This, however, is not a legitimate inquiry under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to

had occasion to make of other clauses in the fourth section, namely, that when a contract, originally within its provisions,

avail himself of the consideration for his engagement, except by a receipt of the annual profits of the land, as they might accrue, for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated, that it was to extend into the third year for its performance, both on the part of the plaintiff and defendant. Its terms most clearly indicate as much; and by them it must be interpreted." In the case, Moore *v.* Fox, 10 Johns. 224, the court say, to bring the case within the statute, it must appear to be an *express* and *specific* agreement that the contract is not to be performed within one year, and cite the case of Fenton *v.* Emblers, 3 Burr. 1278, where the same language is used by the court. But in the case of Boydell *v.* Drummond, 11 East, 142, in which there was no express and specific agreement, that the contract should not be performed within a year, the court say, that the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute. This seems to show, very clearly, what is to be understood by an *express* or *specific* agreement, that a contract is not to be performed within a year. In the case, Peters *v.* Westborough, 19 Pick. 364, Mr. Justice *Wilde*, in delivering the opinion of the court, says, it must have been expressly stipulated by the parties, *or it must appear to have been so understood by them*, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was? and that it was not to be performed within one year? Or at any rate, that it appears to have been so understood by them." In regard to the third class of cases, namely, where the time for the performance of the contract is made to depend upon some contingency, which may or may not happen within a year, it is settled that they do not come within the statute. This was decided against the opinion of *Holt*, C. J., in the case of Peter *v.* Compton, Skin. 353. There the defendant promised for one guinea to give the plaintiff so many guineas on the day of his marriage. And it was *held* that the plaintiff was entitled to recover although the agreement was not in writing. So, in Fenton *v.* Emblers, 3 Burr. 1278, where the defendant's testator undertook, by his last will and testament, to bequeath the plaintiff a legacy, it was *held* that the undertaking was not within the statute, because the time for its performance depended upon the life of the testator, which might be terminated within a year. Again, in Wells *v.* Horton, 4 Bing, 40, where A. being indebted to the plaintiff, promised him that in consideration of his forbearing to sue, A.'s executor should pay him 10,000*l.*; it was *held* that this was not a promise required by the statute of frauds to be in writing. And this doctrine has been carried so far as to include a case where one undertakes to abstain from doing a certain thing, without limitation as to time, on the ground that such a contract is in its nature binding only during the life of the party. Thus, in Lyon *v.* King, 11 Met. 411, the defendant, for a good consideration, promised the plaintiff that he would not thereafter engage in the staging or the livery stable business in Southbridge. And the court *held* that the contract was not within the statute. *Dewey*, J., said, "The contract might have been wholly performed within a year. It was a personal engagement to forbear doing certain acts. It stipulated nothing beyond the defendant's life. It imposed no duties upon his legal representatives, as might have been the case under a contract to perform certain positive duties. The mere fact of abstaining from pursuing the staging and livery stable business, and the happening of his death, during the year, would be a full performance of this contract. Any stipulations in the contract, looking beyond the year, depended entirely upon the contingency of the defendant's life; and this being so, the case falls within the class of cases in which it has been held that the statute does not apply. So, in Foster *v.* McO'Blenis, 18 Missouri, 88, it was held that a verbal agreement not thereafter to run carriages on a particular route, was not within the statute. But see Roberts *v.* Tucker, 3 Exch. 632; Holloway *v.* Hampton, 4 B. Monr. 415. For other cases depending upon a con-

has been entirely executed on one side, and nothing remains but the payment of the consideration, this may be recovered, notwithstanding the statute. (z) But whether a recovery can be had on the original contract, or only on a *quantum meruit*, is not entirely clear upon the authorities. (*a*) Upon principle, however, we should say that a recovery in such case can be had only upon a *quantum meruit*. (*b*).

We now pass to the seventeenth section. Let us first enquire what satisfies the condition, that the buyer shall accept and actually receive a part of the goods. Some confusion has arisen on this subject, from a want of discrimination be-

tingency, see Gilbert *v.* Sykes, 16 East, 150; Souch *v.* Strawbridge, 2 C. B. 808; M'Lees *v.* Hale, 10 Wend. 426; Blake *v.* Cole, 22 Pick. 97; Peters *v.* Westborough, 19 Pick. 364; Roberts *v.* The Rockbottom Co., 7 Met. 46; Ellicott *v.* Peterson, 4 Maryland, 476; Clark *v.* Pendleton, 20 Conn. 495; Howard *v.* Burgen, 4 Dana, 137. In the case of Tolley *v.* Greene, 2 Sandf. Ch. 91, the Assistant Vice-Chancellor intimated an opinion that a contract which cannot be performed within a year, except upon a contingency which neither party, nor both together, can hasten or retard, such as the death of one of them or of a third person, is not within the statute. But we are not aware that such a distinction finds any support in the decided cases.

(*z*) This point was adjudged in Donellan *v.* Read, 3 B. & Ad. 899. In that case a landlord who had demised premises for a term of years, at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work. And it was held that this was not within the statute of frauds, as an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord. During the argument, *Parke*, J., interrupted the counsel to say, "If goods are sold, to be delivered immediately, or work contracted for, to be done in less than a year, but to be paid for in fourteen months, or by more than four quarterly instalments, is that a case within the statute? In Bracegirdle *v.* Heald, 1 B. & Ald. 722, *Abbott*, J., takes the distinction, that in the case of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen, all that is to be performed on one side is to be done within a year; which was not so in the case then before the Court." And *Littledale*, J., in delivering the judgment of the court, said, "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full, till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part." For other cases illustrating this point, see Cherry *v.* Heming, 4 Exch. 631; Souch *v.* Strawbridge, 2 C. B. 808; Mavor *v.* Pyne, 3 Bing. 285; Lockwood *v.* Barnes, 3 Hill, 128; Broadwell *v.* Getman, 2 Denio, 87; Holbrook *v.* Armstong, 1 Fairf. 31; Compton *v.* Martin, 5 Rich. 14; Bates *v.* Moore, 2 Bail. 614; Johnson *v.* Watson, 1 Geo. 348; Rake *v.* Pope, 7 Ala. 161; Blanton *v.* Knox, 3 Missouri, 342; Talmadge *v.* The Rensselaer & Saratoga R. R. Co. 13 Barb. 493; Stone *v.* Dennison, 13 Pick. 1.

(*a*) See cases cited in preceding note.

(*b*) And see *ante*, p. 316, n. (*w*).

tween a sale at common law, a sale as effected by the statute of Elizabeth, of fraudulent conveyances, and the statute of Charles, of frauds and perjuries. At common law, if the seller makes a proposition and the buyer accepts, and the goods are in the immediate control and possession of the seller, and nothing remains to be done to identify them or in any way prepare them for delivery, the sale is complete, and the property in the goods passes at once and perfectly; the buyer acquires not a mere *jus ad rem*, but an absolute *jus in re;* and he may demand delivery at once, on tender of the price, and sue for the goods as his own if delivery be refused; the seller having no right of property, but a mere right of possession, by way of lien on the goods for his price. (*c*) Then came the statute of Elizabeth, which, aided by construction, made the want of delivery, or of transfer of possession, evidence, more or less conclusive, of fraud, which vitiated the sale. Here then grew up many questions as to what constituted delivery, and what was its effect; and we have seen that a great diversity and conflict of adjudication has existed upon these questions. (*d*) But after the statute of Elizabeth came the statute of Charles, of frauds and perjuries; and this in express terms requires, *in order to sustain an action, both delivery and acceptance;* and the questions which spring up under this statute must be considered as entirely distinct from the former questions. To illustrate this in the simplest form, let us suppose that A. orally orders B. to send him one hundred bales of cotton, of a certain quality and price; B. sends the goods as directed; and here no question can exist under the statute of Elizabeth in respect to the possession, because that has been transferred by the delivery; but the case is still open to any inquiry as to fraud. At common law, A. may say that the cotton is not of the kind or quality that he ordered, and if he can establish this, he has the right of sending it back and refusing to pay for it; if he can not, the transaction is completed; the seller cannot reclaim the cotton, nor the buyer refuse the price. But, by the statute of frauds, the buyer may at once send the cotton

(*c*) See *ante*, vol. 1, pp. 440, 441.
(*d*) See *ante*, vol. 1, pp. 441, 442.

back, and refuse payment for it, although precisely what he ordered, and no action can be brought against him for the price. Because, by this statute both delivery and acceptance are requisite; and the delivery is to be made by one party, and the acceptance by another; and the consequence of this is, that while the seller is bound by his delivery, and cannot reclaim the goods, the buyer has his option to keep the goods and pay for them, or return them and not pay. The statute in fact *postpones* the completion of an oral contract of sale. At common law, it is finished when one makes the offer of sale and the other accepts. By the statute, nothing is done by this offer and acceptance; another step must be taken; the goods themselves must be offered and accepted, and then only is the sale completed. It should seem, perhaps, that the same reason would give the seller, after delivery of the goods, and before acceptance of them, the same right to withdraw his goods, that he has to withdraw his offer before an acceptance of it; but we are not aware of any authority to this effect.

In regard to what constitutes a delivery under the statute, and what constitutes an acceptance, there have been many decisions which it is difficult to reconcile. But the question is often one of fact rather than of law. Indeed it is always a question of fact for the jury, whether the goods were delivered and accepted; but it is a question on which they will be directed by the court; and thus the question becomes a mixed one, of fact and law.

It may be said, in general, that a delivery must be a transfer of possession and control, made by the seller, with the purpose and effect of putting the goods out of his hands. (*e*)

(*e*) Phillips *v.* Bistolli, 2 B. & Cr. 511; Dole *v.* Stimpson, 21 Pick. 384; Tempest *v.* Fitzgerald, 3 B. and Ald. 680. In the earlier cases, slight acts were considered as sufficiently evidencing the actual receipt of the property by the purchaser. Chaplin *v.* Rogers, 1 East, 192; Hodgson *v.* Le Bret, 1 Camp. 233; Anderson *v.* Scott, 1 Campb. 235, n.; Elmore *v.* Stone, 1 Taunt. 458; Blenkinsop *v.* Clayton, 7 Taunt. 597; Vincent *v.* Germond, 11 Johns. 283. But the later cases are much more strict. See Howe *v.* Palmer, 3 B. & Ald. 321; Tempest *v.* Fitzgerald, id. 680; Maberley *v.* Sheppard, 10 Bing. 99; Carter *v.* Toussaint, 5 B. & Ald. 855; Baldey *v.* Parker, 2 B. & Cr. 37. "To constitute delivery," in the language of *Parke*, B., in Bill *v.* Bament, 9 M. & W. 41, "the possession must have been parted with by the owner, so as to deprive him of the right of lien." But see Dodsley *v.* Varley, 12 Ad. & El. 632. The question, what constitutes a sufficient delivery to satisfy the statute was much discussed in New

This is a sufficient delivery, whatever be its form. Hence it may be constructive; as by the delivery of a key of a ware-

York, in the recent case of Shindler *v.* Houston, 1 Denio, 48, 1 Comst. 261. In that case the plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock, and in the view of the parties at the time of the bargain, and which had been before that time measured and inspected. The defendant offered a certain price per foot, which being satisfactory to the plaintiff, he said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of the lumber, and take it to one House, who was the defendant's agent, and who, he said, would pay the amount. This was soon after done, but payment was refused. The price being over fifty dollars, and the statute of frauds being relied on, it was *held* by the Supreme Court, in an action for the price of the lumber, upon a declaration for lumber sold and delivered, that the court below was right in refusing to charge the jury that the property did not pass at the time of the bargain; and that the facts were properly submitted to the jury, with instructions that they might find an absolute delivery and acceptance of the lumber at the time of the bargain, and that the payment was postponed, and credit given therefor, until the inspector's bill should be presented to House. But upon appeal to the Court of Appeals, the judgment of the Supreme Court was reversed. And *Wright*, J., in delivering his opinion in the latter court, said, "It is to be regretted that the plain meaning of the statute should ever have been departed from, and that anything short of an actual delivery and acceptance should have been regarded as satisfying its requirements, when the memorandum was omitted; but another rule of interpretation, which admits of a constructive or symbolical delivery, has become too firmly established now to be shaken. The uniform doctrine of the cases, however, has been, that in order to satisfy the statute there must be something more than mere words—that the act of *accepting* and *receiving* required to dispense with a note in writing, implies more than a simple act of the mind, unless the decision in Elmore *v.* Stone, 1 Taunt. 458, is an exception. This case, however, will be found upon examination to be in accordance with other cases, although the acts and circumstances relied on to show a delivery and acceptance, were extremely slight and equivocal; and hence the case was doubted in Howe *v.* Palmer, 2 B. & Ald. 324, and Proctor *v.* Jones, 2 C. & P. 534, and has been virtually overruled by subsequent decisions. Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the *precise form of words* to show a delivery and receipt of the goods. The learned author of the Commentaries on American Law, cites from the Pandects the doctrine that the consent of the party upon the spot is a sufficient possession of a column of granite, which by its weight and magnitude, was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions, in the common law courts of England and of this country, it is sufficient perhaps to observe that the Roman law has nothing in it analogous to our statute of frauds. In Elmore *v.* Stone, expense was incurred by direction of the buyer, and the vendor, at his suggestion, removed the horses out of the sale stable into another, and kept them at livery for him. In Chaplin *v.* Rogers, 1 East, 192, to which we were referred on the argument, the buyer sold part of the hay, which the purchaser had taken away; thus dealing with it as if it were in his actual possession. In the case of Jewett *v.* Warren, 12 Mass. 300, to which we were also referred, no question of delivery under the statute of frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of Elmore *v.* Stone and Chaplin *v.* Rogers are the most barren of acts indicating delivery, but these are not authority—for the doctrine that words, *unaccompanied by acts* of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes, the law might as

house, (*f*) or making an entry in the books of the warehouse keeper, (*g*) or delivery, with indorsement, of a bill of lading, (*h*) or even of a receipt. (*i*) Or, without even so

well be stricken from our statute book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with anything but unequivocal acts of the parties; not mere words, that are liable to be misunderstood, and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold. But will proof of words alone show a delivery and acceptance from which consequences like these may be reasonably inferred? Especially, if those words relate not to the question of delivery and acceptance, but to the contract itself? A. and B. verbally contract for the sale of chattels, for ready money; and without the payment of any part thereof, A. says, "I deliver the property to you," or "It is yours," but there are no acts showing a change of possession, or from which the facts may be inferred. B. refuses payment. Is the right of the vendor, to retain possession as a lien for the price, gone? Or, in the event of a subsequent discovery of a defect in the quantum or quality of the goods, has B. in the absence of all acts on his part showing an ultimate acceptance of the possession, concluded himself from taking any objection? I think not. As Justice *Cowen* remarks, in the case of Archer *v.* Leh, 5 Hill, 205, "One object of the statute was to prevent perjury. The method taken was to have something done; not to rest every thing on mere oral agreement." The acts of the parties must be of such a character as unequivocally to place the property within the power, and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit."

(*f*) Wilkes *v.* Ferris, 5 Johns. 335; Chappel *v.* Martin, 2 Aik. 79.

(*g*) Harman *v.* Anderson, 2 Campb. 243.

(*h*) Peters *v.* Ballister, 3 Pick. 495. See next note.

(*i*) Wilkes *v.* Ferris, 5 Johns. 335. And see Searle *v.* Keeves, 2 Esp. 598; Harman *v.* Anderson, 2 Campb. 243; Withers *v.* Lyss, 4 id. 237; Tucker *v.* Ruston, 2 C. & P. 86. But according to the later English cases, there must be, in addition to the indorsement and delivery of the bill of lading or receipt, a consent and agreement by the person having the custody of the property, to hold it for the party so receiving the bill of lading or receipt. Thus, in Farira *v.* Hone, 16 M. & W. 119, goods were shipped by the plaintiff from abroad to this country, on the verbal order of the defendant, at a price exceeding 10*l.* They were sent to a shipping agent of the plaintiff, in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges. The agent indorsed and delivered this warrant to the defendant, who kept it for several months, and, notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods; and that they would remain for the present in bond:—*Held*, that there was no such delivery to, and acceptance by the defendant of the goods, as to satisfy the 17th section of the statute of frauds. And *Parke*, B., said, "This warrant is

much as this, where the goods are bulky and difficult of access or removal, as a quantity of timber floating in a boom, or a mass of granite, or a large stack of hay. (*j*) So a part may be delivered for the whole, and in general a delivery of part is a delivery of the whole, if it be an integral part of one whole, (*k*) but not if many things are sold and bought as distinct articles, and some of them are delivered and some are not. (*l*)

And a sale by sample is not a sale with delivery, if the sample be first sent and afterwards the sale completed. But after a sale is made, a part of the goods may be delivered nominally as a sample, but yet so as to make it a part delivery and acceptance. (*m*) We think that if the seller does in any case, what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself and to the buyer, this is always a delivery; and nothing less than this is so.

In like manner as to the question of acceptance, we must inquire into the intention of the buyer, the nature of the goods, and the circumstances of the case. If the buyer intends to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; (*n*) although this intention may be manifested by a great variety

no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignee (who is the vendor's agent), and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee." And see Bentall *v.* Burn, 3 B. & Cr. 423; Lackington *v.* Atherton, 7 M. & Gr. 360.

(*j*) Jewett *v.* Warren, 12 Mass. 300; Boynton *v.* Veasie, 24 Maine, 286; Gibson *v.* Stevens, 8 How. 384; Calkins *v.* Lockwood, 17 Conn. 154. But see Shindler *v.* Houston, 1 Denio, 48, 1 Comst. 261.

(*k*) Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 4 B. & P. 69; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Railway Co. 12 M. & W. 33; Biggs *v.* Wisking, 25 E. L. & E. 257; Mills *v.* Hunt, 20 Wend. 431; Davis *v.* Moore, 13 Maine, 424.

(*l*) Price *v.* Lea, 1 B. & Cr. 156; Seymour *v.* Davis, 2 Sandf. 239.

(*m*) In other words, the delivery of a sample, which is no part of the thing sold, will not take a sale out of the statute, but if the sample be delivered as part of the bulk, it then binds the contract. Talver *v.* West, Holt, N. P. 178; Johnson *v.* Smith, Anthon, N. P. 60; Hinde *v.* Whitehouse, 7 East, 558.

(*n*) Baines *v.* Jevons, 7 C. & P. 288 Saunders *v.* Topp, 4 Exch. 390.

of acts, in accordance with the varying circumstances of different cases. He has a right to examine the goods, and ascertain their quality, before he determines whether to accept or not; and a retention by him for a time sufficient for this examination, and no more, is not an acceptance. (*o*)

It is a question, perhaps of some difficulty, how far such intention on the part of the buyer, and a corresponding act, are consistent with his reserving the right of making any future objection to the goods, on the score of quantity or quality, and rescinding the sale on such ground. The greater number of decisions declare such reservation to be incompatible with acceptance and actual receipt, and hold therefore that while the buyer retains this right, he has not accepted the goods under the statute. (*p*) But a recent decision of much weight insists upon what seems to be the opposite doctrine. (*q*) We think, however, the seeming conflict

(*o*) Percival *v.* Blake, 2 C. & P. 514; Kent *v.* Huskinson, 3 B. & P. 233; Phillips *v.* Bistolli, 2 B. & Cr. 511.

(*p*) Per *Parke*, J., in Smith *v.* Surman, 9 B. & Cr. 561, 577; Norman *v.* Phillips, 14 M. & W. 277; Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 557; Acebal *v.* Levy, 10 Bing. 376; Cunliffe *v.* Harrison, 6 Exch. 903; Curtis *v.* Pugh, 10 Q. B. 111; Ontwater *v.* Dodge, 6 Wend. 397.

(*q*) Morton *v.* Tibbett, 15 Q. B. 428. This was an action brought to recover the price of fifty quarters of wheat. It appeared that on the 25th of August, 1848, the plaintiff and defendant being at March market, the plaintiff sold the wheat to the defendant by sample. The defendant said that he would send one Edgley, a general carrier and lighterman, on the following morning, to receive the residue of the wheat in a lighter, for the purpose of conveying it by water, from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On 26th August, Edgley received the wheat accordingly. On the same day the defendant sold the wheat, at a profit, by the same sample, to one Hampson, at Wisbeach market. The wheat arrived at Wisbeach, in due course, on the evening of Monday, the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the wheat; nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendant; and the defendant, on Wednesday, the 30th August, sent a letter to the plaintiff repudiating his contract with him on the same ground. There being no memorandum in writing of the contract, it was objected for the defendant that there was no evidence of acceptance and receipt, to satisfy the requirements of the statute of frauds. *Pollock*, C. B., before whom the case was tried, overruled the objection, and a verdict was found for the plaintiff. Afterwards, the case being brought before the Queen's Bench, on a motion to enter a nonsuit, pursuant to leave reserved at the trial, Lord *Campbell*, in delivering the judgment of the court, said, "In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods, and actually received the same, so as to render him liable as buyer, although he did not give anything in earnest to bind the bargain, or in part payment, and there was no note or memorandum, in writing, of the bargain. It would be very difficult to reconcile the cases on this

comes from confounding two questions which are distinct. If the buyer accepts and actually receives the goods with a

subject; and the difference between them may be accounted for by the exact words of the 17th section of the statute of frauds not having been always had in recollection. Judges, as well as counsel, have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and, after that, an actual acceptance of the same. Hence, perhaps, has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the act of parliament are; [here his lordship stated the whole of the 17th section.] It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with, when by mutual consent there has been part performance. Hence, the payment of any sum in earnest, to bind the bargain, or in part payment, is sufficient. This act on the part of the buyer, if acceded to on the part of the vendor, is sufficient. The same effect is given to the corresponding act by the vendor, of delivering part of the goods sold to the buyer, if the buyer shall accept such part, and actually receive the same. As part payment, however minute the same may be, is sufficient, so part delivery, however minute the portion may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract, to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract, and to allow the contract to be established by parol, as before the statute of frauds passed. The question may then arise, whether it has been performed, either on the one side or the other. The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer, at all events, to object to the quantity and quality of the residue, and, even where there is a sale by sample, that the residue offered does not correspond with the sample. We are, therefore, of opinion that, whether or not a delivery of the goods sold, to a carrier or any agent of the buyer, is sufficient, still there may be an acceptance and receipt, within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance, to let in parol evidence of the contract, appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled. We are, therefore, of opinion, in this case, that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." His lordship then proceeded to examine most of the cases cited in the preceding note, and arrived at the conclusion that they were not sufficiently strong to control the action of the court; and the rule for a nonsuit was accordingly discharged. Since the decision of this case, the case of Hunt *v.* Hecht, 20 E. L. & E. 524, has been decided in the Court of Exchequer. That was an action for goods sold and delivered. On the trial it appeared that one of the defendants, who were partners, called on the plaintiff, a bone-merchant, for the purpose of buying bones. He there saw a heap containing a quantity of the kind he desired to buy, but intermixed with others which were unfit for manufacturing purposes. He ultimately agreed with the plaintiff to buy the heap, if the objectionable bones were taken out. It was arranged between them that the plaintiff should deliver the bones at Brewer's Quay, in sacks, marked in a particular way; and the defendant gave the plaintiff a shipping note, or order, directed to the wharfinger, requesting him to receive and ship the goods, when the plaintiff should send them. The plaintiff sent the bags accordingly, marked as requested. They were

knowledge of their deficiency in quality, or quantity, and without objection, he waives all right of future objection on this ground. If he accepts the same goods in the same way, without a knowledge of a deficiency which gives him a right of objection, and subsequently acquires this knowledge, he cannot return the goods and defend against an action for the price, under the statute, because the whole requirement of the statute has been satisfied; but he may, at common law, whether the contract of sale were oral or written, on the ground that the seller did not send or deliver to him what he bought. If the buyer expressly declares that he reserves the right of examining and objecting, this, perhaps, should be regarded rather as a conditional acceptance, which becomes complete and actual only when the condition has been satisfied.

A question has been made whether a delivery by the vendor to a carrier, satisfies the statute. The general question of the effect of delivery to a carrier, has been considered in the chapter on the sale of personal property. (*r*) Here, it is only necessary to remark, that the delivery to a common-carrier

delivered at the wharf, and received by the wharfinger, on Wednesday, the 9th of February, but the defendants did not hear of their being sent until the following day, when the invoice was received. The defendants then examined the bones and wrote to the plaintiff complaining of their quality, and declining to accept them. Upon this evidence, *Martin*, B., before whom the case was tried, nonsuited the plaintiff. And the Court of Exchequer *held* that the nonsuit was right. *Pollock*, C. B., said, "The goods were received by the person appointed by the defendants, but they were not at any time accepted. The defendants never saw them when they were in a state to be accepted, because they had not been separated. A man does not accept flour by looking at the wheat that is to be ground. The article must be in a condition to be accepted. There was no evidence of any acceptance of these bones, for the defendants never saw them after the separation had taken place." *Alderson*, B.,—"If a man buys a quantity out of a larger bulk, he does not buy it until it is separated from the rest; and there must be an acceptance after the separation. He must have an opportunity of refusing what the vendor may have selected. Here there was a delivery, but no acceptance." *Martin*, B.—"The question is, whether the defendants accepted part of the goods sold, and actually received the same. The contract was for such bones in the heap as were ordinarily merchantable, and they were only bound to accept such merchantable bones. Directions were, no doubt, given to the wharfinger, to receive the bones, and in one sense they were received; but this was not an acceptance within the statute. There is no acceptance unless the purchaser has exercised his option, or has done something that has deprived him of his option. Morton *v.* Tibbett is a correct decision, because the purchaser had there dealt with the goods as his own, but much that is said in that case may be open to doubt. The decisions, in my opinion, show that the acceptance must be after the purchaser has exercised his option, or has done something to preclude himself from doing so."

(*r*) See *ante*, vol. 1, p. 445.

has been held to be such passing of the property out of the possession and control of the seller, as satisfies the statute, although the carrier is for some purposes the agent of the seller, who retains his lien, or quasi lien, by his right to stop the goods in transitu. (*s*) We think this open to much doubt; and certainly, though it may be a delivery, it is not yet an acceptance by the buyer. But if the buyer designates a person as his carrier, (although this person's occupation may be that of a common-carrier) and directs the seller to deliver the goods as the buyer's, to this person, then it might be held that the delivery was made to the buyer through an

(*s*) Hart *v.* Sattley, 3 Campb. 524. This was an action to recover the price of a hogshead of gin. The plaintiffs were spirit merchants in London, who had been in the habit of supplying spirits to the defendant, a publican, near Dartmouth, in Devonshire. In these previous dealings the course had been for the plaintiff to ship the goods on board a Dartmouth trader, in the river Thames, and the defendant had always received them. The hogshead of gin in question was verbally ordered by the defendant of the plaintiff's traveller, and was shipped in the same manner as the others had been. There was no evidence either that it had been delivered to the defendant in Devonshire, or that he refused to accept it. On the trial, before *Chambre*, J., the statute of frauds being relied on in defence, the learned judge said, "I think, under the circumstances of this case, the defendant must be considered as having constituted the master of the ship his agent, to *accept and receive the goods*." His lordship would seem to have rested his opinion, in some degree, upon the previous course of dealing between the parties. But the case must be considered as overruled by subsequent decisions. Thus, in Hanson *v.* Armitage, 5 B. & Ald. 557, it appeared that the plaintiffs, merchants in London, had been in the habit of selling goods to the defendant, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to the defendant by the first ship. In pursuance of a parol order from the defendant, goods were delivered to, and accepted by the warfinger, to be forwarded in the usual manner. *Held*, that this not being an acceptance by the buyer, was not sufficient to take the case out of the statute. And in the recent case of Meredith *v.* Meigh, 2 El. & Bl. 364, the facts were that goods were delivered by the vendor, in Cornwall, on board a ship not named by the purchaser, and a bill of lading was signed by the captain, making them deliverable to carriers at Liverpool, named by the purchaser, for the purpose of receiving and forwarding the goods to him, in Staffordshire. A copy of the bill of lading was sent to the carriers at Liverpool, and on the 25th of April the purchaser received notice of the shipment of the goods, and did not repudiate the contract before the 6th May, when he received information from the vendor that the ship and the goods were lost before they reached Liverpool. In an action by the vendor for the price of the goods, it was *held*, that there was no evidence to go to the jury of an acceptance and actual receipt of the goods by the defendant, within the statute of frauds. And Lord Campbell said, "Considering that no ship was named by the vendee, the mere delivery of the goods on board the Marietta, and the signing the bill of lading by the captain, was not sufficient acceptance and receipt within the statute. Hart *v.* Sattley, 3 Campb. 528, if it be supposed to lay down such law, must be considered to have been overturned by subsequent decisions, in which I concur." And *Crompton*, J., said, "The delivery of goods to a carrier for the purpose of being carried, or to a wharfinger to be forwarded to the vendee by the first ship, in the usual manner, is not evidence of an acceptance and receipt, within the statute of frauds." And see Acebal *v.* Levy, 10 Bing, 376.

agent, and an acceptance made by the buyer through an agent. (*t*) But whether a designation of the carrier, and an order to deliver, and a compliance on the part of the seller, be such as to have this effect, must depend upon the intentions and acts of the parties, and the circumstances of each case. (*u*)

(*t*) See Coats *v.* Chaplin, 3 Q. B. 483.

(*u*) In Bushel *v.* Wheeler, 15 Q. B. 442, n., the defendant living at Hereford, ordered goods, at a price above 10*l.*, of the plaintiff, living at Bristol, and directed that they should be sent by The Hereford, sloop, to Hereford. They were sent accordingly; and a letter of advice was also sent to the defendant, with an invoice, stating the credit to be three months. On their arrival at Hereford, they were placed in the warehouse of the owner of the sloop, where the defendant saw them; and he then said to the warehouseman that he would not take them; but he made no communication to the plaintiff till the end of five months, when he repudiated the goods. In an action for the price of the goods, the judge before whom the cause was tried, having instructed the jury that there was no acceptance and actual receipt sufficient to satisfy the statute of frauds, it was *held*, that this instruction was erroneous, and that he should have left them to find, upon these facts, whether or not there had been such acceptance and actual receipt. And Lord *Denman* said, "The general intention of the statute is, that there should be a writing; this, as well as the exception for the case of delivery and acceptance, has been construed literally. Still, it must be a question whether there has been an acceptance and actual receipt. It is not necessary that the purchaser himself should form a judgment on the article sent; he may depute another to do so; or he may rely upon the seller. The defendant here orders the goods to be sent by a particular vessel which he names, and he receives the invoice, which states a three months' credit. He allows the goods to remain till that credit is expired, giving no notice to the seller, though he did say to his own agent that he would not take them. Now, such a lapse of time, connected with the other circumstances, might show an acceptance;—whether there was an acceptance or not, is a question of fact. I do not think that the mere taking by the carrier is a receipt by the vendee; but the jury here should have been allowed to exercise a judgment on the question whether there was an actual receipt." *Williams*, J. "When it is once settled that manual occupation is not essential to an actual receipt, and it is not now contended that it is, it becomes a question whether there have been circumstances constituting an actual receipt. The larger the bulk, the more impracticable it is that there should be a manual receipt; something there must be in the nature of constructive receipt, as there is constructive delivery. It being then once established that there may be an actual receipt by acquiescence, wherever such a case is set up it becomes a question for the jury whether there is an actual receipt. And all the facts must be submitted to their consideration, for the determination of that question." *Coleridge*, J. "I agree that the acceptance must be, in the words of one of the cases cited, 'strong and unequivocal.' Maberley *v.* Sheppard, 10 Bing. 101. But that is quite consistent with its being constructive. Therefore, in almost all cases, it is a question for the jury, whether particular instances of acting or forbearing to act, amount to acceptance and actual receipt. Here goods are ordered by the vendee to be sent by a particular carrier, and, in effect, to a particular warehouse; and that is done in a reasonable time. That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case the vendee would have had the right to look at the goods, and to return them if they did not correspond to order. But here the vendee takes no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary. The question must go to the jury." But see this case commented on, in Norman *v.* Phillips, 14

It has been much doubted whether a contract for the sale of stock or shares in a corporation or joint-stock company, was within the statute. The question is, are they "goods, wares, or merchandises?" and the English authorities deny this; (*v*) in some degree on the ground of a supposed analogy with the bankrupt law, within which the purchasing of stock does not bring one, unless the purchase was for the purpose of trading in it, as by brokers. But it has been decided, in this

M. & W. 207. In Snow *v.* Warner, 10 Met. 132, it was held that goods are received and accepted by the purchaser, within the statute of frauds, when they are transported by the seller to the place of delivery appointed by the agent who contracted for them, and are there delivered to another agent of the purchaser, and are by him shipped to a port where the purchaser had given him general directions to ship goods of the same kind. And *Hubbard*, J., in that case said, "The authorities cited by the defendant's counsel, and upon which he relies, go to establish the doctrine that a constructive delivery to a wharfinger, or a shipmaster, or to other persons engaged in receiving the goods of others, will not be a compliance with the statute of frauds, to bind the party as having accepted the goods. There was also, apparently, a leaning in the mind of Lord Chief Justice *Abbott*, to the opinion that the terms of the statute must be literally complied with; that is, that there must be an acceptance of the goods by the purchaser himself. Hanson *v.* Armitage, 1 Dowl. & Ryl. 131. We are fully of opinion that the acceptance must be proved by some clear and univocal act of the party to be charged. The statute, by its language, requires it, and the construction it has received gives full force to that language. But we cannot say that, to bind the purchaser, the acceptance can only be by him personally. The statute, in terms, provides that an agent may bind his principal by a memorandum in writing. If, then, an agent can purchase, we think it clearly follows — there being no prohibitory clause — that an agent duly authorized may also receive property purchased, and thus bind the principal. It is in accordance with the rights and duties of principals and agents, in other cases, and for the furtherance of trade and commerce. In the present case, it was proved that the plaintiffs transported the barrels to Boston, and delivered them at the place where the purchaser's agent directed, and that the agent in Boston afterwards shipped them to the port at the South, where the defendant had given general directions to have his barrels sent; and we are of opinion, with the learned judge who tried the cause in the court below, that this was a sufficient acceptance of the goods, within the statute. There was a delivery by the vendors to an agent authorized to receive, an acceptance by him, and a forwarding of them to the place appointed by the principal. These acts are direct and unequivocal, and constitute a transfer of the property from the seller to the purchaser, who, in consequence of it, is bound to pay the price of the purchase."

(*v*) Humble *v.* Mitchell, 11 Ad. & El. 205. The principle upon which the English cases proceed, is thus explained by Sir L. *Shadwell*, in Duncuft *v.* Albrecht, 12 Sim. 189; — "It is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares, and merchandises which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares, and merchandises, within the meaning of the 17th section." And see further, Pickering *v.* Appleby, Comyns, 354; Colt *v.* Nettervill, 2 P. Wms. 304; Knight *v.* Barber, 16 M. & W. 66; Heseltine *v.* Siggers, 1 Exch. 856.

country, that a sale of stock in a manufacturing company, is within the statute; (*w*) and on this authority, as well as on general principles, we should suppose that the sale of any

(*w*) Tisdale *v.* Harris, 20 Pick. 9. In this case *Shaw*, C. J., said, "Supposing this a new question, now for the first time calling for a construction of the statute, the court are of opinion, that, as well by its terms, as its general policy, stocks are fairly within its operation. The words 'goods' and 'merchandise,' are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word 'merchandise,' also, including, in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and hence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal and coercive, and tended to deprive a man in trade of all his property. But most joint-stock companies were founded on the hypothesis, at least, that most of the shareholders took shares as an investment, and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant, so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question. The main argument relied upon, by those who contend that shares are not within the statute, is this: that the statute provides that such contract shall not be good, &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, &c., shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which, from their nature, it cannot apply. There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statue to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the terms goods, as they are within the reason and policy of the act, the court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action." And see, to the same effect, Colvin *v.* Williams, 3 H. & Johns. 38; North *v.* Forest, 15 Conn. 400; So. Life Ins. & Tr. Co. *v.* Cole, 4 Florida, 359. But the decision in this last case was based, in some measure, upon the fact that the Florida statute contains, in addition to the words used in the English statute, the words, "personal property." In Baldwin *v.* Williams, 3 Met. 365, it was decided that a contract for the sale of promissory notes is within the statute. But see *contra*, Whittemore *v.* Gibbs, 4 Frost. 484. So also, in Beers *v.* Crowell, Dudley, [Geo.] 28, it was decided that treasury checks on the bank of the United States were not within the statute.

incorporated stock would be held within the operation of the statute. (*x*)

We will next inquire what giving in earnest, or in part payment, satisfies the requirement of the statute. The statute borrows "earnest" from the common law, and does not greatly vary the law in relation to it. If one offers a watch to another for one hundred dollars, and the other accepts, and forthwith tenders the money, he acquires a property in the watch at common law; if he accepts, but does not pay or tender the price, the property does not pass, and the vendor is not bound by the contract, which is presumed to have contemplated payment on the spot. (*y*) But if the buyer, when he accepted the offer, gave something by way of earnest, and it was accepted as such, this bound the parties at common law. Neither could rescind the sale; but the buyer could tender the price at any time and demand the goods, and the seller could tender the goods, and after the time agreed on had expired, could sue for the price. This remains so under the statute, which does not seem to add anything to the force or effect of the earnest.

The small value of the thing given as earnest, is no objection to it, but it would seem that it must have some value. A dime or a cent might suffice, but not a straw or a chip. And it must be actually given and received; merely touching or crossing the hand with it is not enough; (*z*) and it must be given and received as earnest.

Part payment has the same effect as earnest. But it must be an actual payment; and not a mere agreement that something shall be considered as a payment. Thus, if the seller owes the buyer, and part of the contract of sale is that the debt shall be discharged and go as part payment of the price, nevertheless the contract must be in writing, because this is not an actual part payment. (*a*)

A question of considerable difficulty has been raised, as to whether, and how far, this section of the statute of frauds applies to executory contracts. If one agrees to buy at a

(*x*) See preceding note.
(*y*) See *ante*, vol. 1, pp. 435, 436.
(*z*) Blenkinsop *v.* Clayton, 7 Taunt. 597.
(*a*) Walker *v.* Nussey, 16 M. & W. 302.

future time, there are three forms which the contract may assume. One is to buy hereafter what is now existing; a second, to buy hereafter what is not now existing, but is to be supplied hereafter, for the sum agreed on, which is to be regarded only as the price of the article; the third is, to buy hereafter an article to be manufactured by the seller, and the bargain implies that the money to be paid is for the manufacturing, as well as for the article.

In the earlier English decisions, it seems to have been held, for some time, as a settled rule of law, that no executory contract of sale was within this section of the statute. (*b*) But this doctrine was overthrown by Lord *Loughborough*, who, however, admitted that where an executory contract of purchase and sale provided for work and labor upon the article previous to its delivery, and important materials to be furnished, the agreement was not within the statute. (*c*) The ruling of Lord *Loughborough* is, however, open to the objection that it conflicts with what seems to be a perfectly well-established principle; that if an entire contract be in part within the statute and in part without, it must altogether comply with the terms of the statute, or no action can be brought upon it. And yet he holds that an agreement for

(*b*) See Towers *v.* Osborne, 1 Strange, 506; Clayton *v.* Andrews, 4 Burr. 2101; Alexander *v.* Comber, 1 H. Bl. 20.

(*c*) Rondeau *v.* Wyatt, 2 H. Bl. 63. In this case the plaintiff and defendant entered into a verbal agreement for the sale of 3,000 sacks of flour, to be delivered to the plaintiff at a future period; and this agreement was held to be within the statute. Lord *Loughborough*, in delivering the judgment of the court, said, "It is singular that an idea could ever prevail, that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain, from the words made use of, that it was meant to regulate executory, as well as other contracts. The words are, '*No* contract for the sale of any goods,' &c. And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent. The case of Simon *v.* Metivier, 3 Burr. 1921, was decided on the ground that the auctioneer was the agent as well for the defendant as the plaintiff, and therefore that the contract was sufficiently reduced into writing. The case of Towers *v.* Sir John Osborne, 1 Stra. 506, was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In Clayton *v.* Andrews, 4 Burr. 2101, which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be threshed before the delivery. This, perhaps, may seem to be a very nice distinction, but still the work to be performed in threshing, made, though in a small degree, a part of the contract."

the purchase of corn to be delivered hereafter, is not within the statute, if any threshing is to be done upon it in the mean time, because the price of the corn will pay for this threshing.

There have been, since that time, many cases turning upon this question, and it is impossible to reconcile them all with any acknowledged principle of statutory construction. It must, indeed, be impossible to frame any rules which shall be always applicable without difficulty to this question; but, this difficulty may arise, as is remarked by the Supreme Court of Massachusetts, (*d*) "not so much from any uncertainty in the rule, as from the infinitely various shades of different contracts." From general principles, however, illustrated by recent decisions, we should draw the following rules. A pure executory contract for the sale of goods, wares, or merchandises, is as much within the statute, as a contract of present sale. (*e*) A contract for an article not now the seller's, or not existing, and which must therefore be bought or manufactured before it can be delivered, will also be within the statute, if it may be procured by the seller by purchase from any one, or manufactured by himself at his choice, the bargain being in substance as well as form, only, that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But if the contract states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labor, skill, and material, so that they cannot be discriminated, it is not a contract of purchase and sale, but a contract of hiring and service, or a bargain by which one party undertakes to labor in a certain way for the other party, who is thereupon to pay him certain compensation; and this contract is, therefore, not within the statute. (*f*) And these rules will be found to reconcile most

(*d*) In Gardner *v.* Joy, 9 Met. 177.

(*e*) Cooper *v.* Elston, 7 T. R. 14; Bennett *v.* Hull, 10 Johns. 364; Jackson *v.* Covert, 5 Wend. 139; Downs *v.* Ross, 23 Wend. 270; Garbutt *v.* Watson, 5 B. & Ald. 613; Smith *v.* Surman, 9 B. & Cr. 561; Cason *v.* Cheely, 6 Geo. 554; Rondeau *v.* Wyatt, 2 H. Bl. 63.

(*f*) This distinction is well explained and illustrated in Hight *v.* Ripley, 19 Maine, 137. In that case the defendant agreed with the plaintiff "to furnish, as soon as practicable," 1,000 or 1,200 lbs. of malleable hoe shanks, agreeable to patterns left with him; and to furnish a larger amount if required at a diminished price. And the court held that

of the recent authoritative decisions on this subject. We think also that this will be found to be the true meaning and

this must be considered as a contract for the manufacture of the articles referred to, and so not within the statute of frauds. *Shepley*, J., said, "It may be considered as now settled, that the statute of frauds embraces executory as well as executed contracts for the sale of goods. But it does not prevent parties from contracting verbally for the manufacture and delivery of articles. The only difficulty now remaining is, to decide whether the contract be one for the sale, or for the manufacture and delivery of the article. It may provide for the application of labor to materials already existing partially or wholly in the form designed, and that the article improved by the labor shall be transferred from one party to the other. In such cases there may be difficulty in ascertaining the intentions; and the distinction may be nice, whether it be a contract for sale or for manufacture. The decision in the case of Towers *v.* Osborne, 2 Strange, 506, is esteemed to have been correct, while the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order. In Garbutt *v.* Watson, 5 B. & Ald. 613, the contract was "for the sale of 100 sacks of flour, at 50*s.* per sack, to be got ready by the plaintiff to ship to the defendant's order, free on board, at Hull, within three weeks." There was an attempt to exclude it from the statute, because the plaintiffs were millers, and had not the flour then ground and prepared for delivery. But the contract did not provide that they should manufacture the flour; they might have purchased it from others, and have fulfilled all its terms. It was decided to be a contract for the sale of the flour, and within the statute. If the contract be one of sale, it cannot be material whether the article be then in the possession of the seller, or whether he afterward procure or make it. A contract for the manufacture of an article, differs from a contract of sale, in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party, combined with the materials, for which he contracted, and to which he is entitled. Hence it has been said, that if the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale. In Crookshank *v.* Burrell, 18 John. 58, the contract was, that the defendant should make the wood work of a wagon for the plaintiff by a certain time; and it was decided not to be a contract for sale. In the case of Mixer *v.* Howarth, 21 Pick. 205, the contract was, that the plaintiff should finish for the defendant a buggy, then partly made; and it was decided not to be a contract for sale. The contract in this case provides, that the defendants should "furnish, as soon as practicable, 1,000 or 1,200 lbs. of malleable hoe shanks, agreeable to patterns left with them." They were to be "delivered at their furnace." There is a provision, that the defendants may immediately receive orders for a larger amount, say 2,000 lbs. more than heretofore stated," and that 'the whole amount is (in such case) to be charged at a diminished price.' Taking into consideration all the provisions of the contract, there can be little doubt that it was the intention of the parties, that the defendants should manufacture the shanks at their furnace, agreeably to certain patterns which had been left with them. There is no evidence in the case tending to prove, that the articles were then existing in the form of the pattern. It may be fairly inferred that they were not, but were to be made as soon as practicable. The testimony presented does not then prove a contract for the sale of goods, but rather one for the manufacture of certain articles of a prescribed pattern, by order of the plaintiff." Again, in Gardner *v.* Joy, 9 Met. 177, it appeared that A. asked B. what he would take for candles; B. said he would take twenty-one cents per pound; A. said he would take one hundred boxes; B. said the candles were not manufactured, but he would manufacture and deliver them in the course of the summer. *Held*, that this was a contract for the sale of goods, within the statute of frauds. And *Shaw*, C. J., said, "It was essentially a contract of sale. The inquiry was for the price of candles; the quantity, price, and terms of sale were fixed, and the

effect of the statute of 9th Geo. 4., c. 14, in extension of the statute of frauds. (*g*)

It is to be noticed, that while some of the sections of this

mode in which they should be put up. The only reference to the fact that they were not then made and ready for delivery, was in regard to the time at which they would be ready for delivery; and the fact that they were to be manufactured, was stated as a indication of the time of delivery, which was otherwise left uncertain." And see Mixer *v.* Howarth, 21 Pick. 205; Spencer *v.* Cone, 1 Met. 283; Lamb *v.* Crafts, 12 Met. 353; Waterman *v.* Meigs, 4 Cush. 497; Watts *v.* Friend, 10 B. & Cr. 446; Cason *v.* Cheely, 6 Geo. 554; Bird *v.* Muhlenbrink, 1 Rich. 199; Hardell *v.* McClure, 1 Chand. 271. Until quite recently, however, both in this country and in England, it was held that all contracts for the sale of articles not then existing in the state in which they were to be delivered, were out of the statute. See Rondeau *v.* Wyatt, 2 H. Bl. 63, cited *supra;* Groves *v.* Buck, 3 M. & S. 178; Crookshank *v.* Burrell, 18 Johns. 58; Sewall *v.* Fitch, 8 Cow. 215. And such the Superior Court of the City of New-York has recently declared to be still the law of New-York. Robertson *v.* Vaughn, 5 Sandf. 1. In that case the defendant made a contract with the plaintiff to make and deliver to him, at a specified time, one thousand molasses shooks and heads. And this was held to be a contract for work and labor, and so not within the statute. *Duer*, J., said, "We certainly think that this case is within the mischief that the statute of frauds was designed to prevent, and that the contract between the parties was substantially a contract for the sale of goods and merchandise, and not for work and labor. But we cannot shut our eyes to the fact, that the case of Sewall *v.* Fitch, 8 Cow. 215, as the counsel for the defendant found himself under the necessity of admitting, is not distinguishable from the present; and that no conflicting decisions are to be found in our own reports. The contract, which the Supreme Court in that case held not to be within the statute, bore an entire analogy to that between the parties now before us, with the single exception that it related to nails instead of shooks. It is true, that it would not be easy to reconcile Sewall *v.* Fitch with the cases in England and in Massachussetts, to which we were referred; but for more than twenty years, it has been considered as evidence of the law in this State, and as such, has doubtless been followed in numerous instances by inferior tribunals. Under these circumstances we think that it belongs only to the court of ultimate jurisdiction to set aside the authority of the decision, and correct the error which it probably involves. If all contracts between merchants and manufacturers for the purchase of goods, *to be thereafter manufactured*, are to be excepted from the statute of frauds, there seems to be little reason for retaining at all those provisions of the statute which relate to the sale of goods to be delivered on a future day, since it is hardly possible to imagine an exception more arbitrary in its nature, and more contrary to the policy upon which the statute is admitted to be founded. Such an exception, embracing, as it does, a very large class of cases, frequently of great amount in value, is, in its principle, equivalent to a repeal; and either the law itself should be abolished, as imposing a needless restraint upon the transaction of business, or, if the sound policy of the law must be admitted, an exception repugnant to its spirit and destructive of its utility, should no longer be permitted to exist. A new statute, similar to 9 Geo. 4, c. 14, seems to be required, and should the attention of the legislature be directed to the subject, would probably be passed; but we are not legislators, and as judges, must administer the law as we find it established." And see Bronson *v.* Wiman, 10 Barb. 406.

(*g*) By that statute it is enacted that "the provisions of the statute of frauds shall extend to all contracts for the sale of goods to the value of 10*l.* or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

statute declare the oral contracts which they are intended to prevent, utterly void, the fourth section only provides that no action shall be brought upon the promises, or for the purposes therein enumerated, and the seventeenth, that no contract specified therein shall "be allowed to be good," *unless* there be earnest, part payment, part delivery and acceptance, or a writing signed. The distinction is sometimes important; nor is it adequately expressed in the cases which say that these oral contracts, embraced within the fourth section, are not void, but voidable, by the statute of frauds? We consider them neither void nor voidable. If they were good at common law, they remain good now, for all purposes but that expressly negatived by the statute; that is, no action can be brought upon them, but in other respects they are valid contracts. (*h*) The nature or effect of the

(*h*) Shaw *v.* Shaw, 6 Verm. 69; Philbrook *v.* Belknap, id. 383; Minns *v.* Morse, 15 Ohio, 568; Whitney *v.* Cochran, 1 Scam. 209; Dowdle *v.* Camp, 12 Johns. 451; Sims *v.* Hutchins, 8 Sm. & M. 328; Souch *v.* Strawbridge, 2 C. B. 808; Crane *v.* Gough, 4 Maryland, 316. This point is well illustrated by the recent case of Leroux *v.* Brown, 14 E. L. & E. 247. That was an action to recover damages for the breach of a parol contract entered into at Calais, in France, by which the defendant, who resided in England, agreed with the plaintiff, a British subject residing at Calais, to employ the plaintiff as the defendant's agent, to collect eggs and poultry at Calais, and to send them over to the defendant in England, the service to be for one year from a future day, at 100*l.* a year. The plaintiff proved that by the law of France, this contract, though not in writing, was valid, and could be enforced by the courts in that country. The defendant set up the 4th section of the statute of frauds as a defence. And the question was whether that section applied to the validity of the contracts embraced within it, or only to the mode of procedure upon them. The court held that the latter was the true construction of the statute, and therefore, that the action could not be maintained. *Jervis*, C. J., said, "There has been no discussion at the bar as to the principles which ought to govern our decision. It is admitted by the plaintiff's counsel, that if the 4th section of the statute of frauds applies, not to the validity of the contract, but only to the mode of procedure upon it, then that, as there is no 'agreement, or memorandum, or note thereof,' in writing, this action is not maintainable. On the other hand, it is not denied that, if that section applies to the contract itself, or, as Bullenois says, to the 'solemnities' of the contract, inasmuch as our law does not affect to regulate foreign contracts, the action is maintainable. On consideration, I am of opinion that the 4th section does not apply to the 'solemnities' of the contract, but to the proceedings upon it; and therefore that this action cannot be maintained. The 4th section, looking at it in contrast with the 1st, 2d, 3d, and 17th, leads to this conclusion. The words are, 'No action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.' It does not say, that, unless those requisites are complied with, the contract shall be void, but only that 'no action shall be brought upon it;' and, as put by Mr. Honyman, with great force, the alternative, requiring the 'agreement or some memorandum thereof' to

contract is not changed; but the statute points out certain modes of confirming or verifying the contract, which are essential to the maintenance of an action upon it. Hence, on the one hand, it supplies no want, as of consideration, or, in other words, makes no contract good which would not be good without it. And, on the other hand, the contract is valid as to third parties, although the statute has not been complied with; (*i*) and, if the contract has been fully executed, the statute has no power over it whatever, and no effect upon the rights, duties, and obligations of the parties. (*j*)

be in writing, shows that the legislature contemplated a contract, good before any writing, but not enforceable without the writing as evidence of it. This view, which the words of the statute present, is also, I think, in conformity with the authorities. The cases cited by the very learned author of the Law of Vendors and Purchasers, and the practise of the courts of equity, show that if any writing be subsequently made and signed by the party to be charged with the agreement, there is a sufficient compliance with the 4th section to enable the other party to enforce the agreement. Authority and practice, therefore, are both in conformity with the words of the statute. But it is said that the cases of Carrington *v.* Roots, 2 M. & W. 248, and Reade *v.* Lamb, 6 Exch. 130, are inconsistent with this view. It is sufficient to say that the attention of the learned judges who decided those cases, was not directed to the particular point raised by the present case. What the court said in those cases was, that for the purposes of the action in those particular instances, there was no difference between the effect of the 4th and the 17th sections. It must not be forgotten that the meaning of those sections has been explained in other cases. In Crosby *v.* Wadsworth, 6 East, 602, Lord *Ellenborough* says, 'The statute,' that is, the 4th section, 'does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them.' The same view is adopted by *Tindall*, C. J., and *Bosanquet*, J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 735, from which it appears that the contract is good antecedent to any writing, and that the effect of the 4th section is, not to avoid it, but to bar the remedy upon it, unless there be writing. I therefore think that an action on the contract in this case will not lie in this country, because the 4th section relates merely to the mode of procedure, and not to the validity of the contract. This view is not inconsistent with what has been cited from Boullenois, who is speaking of what pertains 'ad vinculum obligationis et solemnitatem,' and not of what relates to the mode of procedure." *Talfourd*, J. "I think Mr. Honyman's argument, drawn from Laythoarp *v.* Bryant, and those cases which decide that the writing required by the statute, may be a letter from the party to be charged, to a third person, containing the terms of the agreement, conclusively shows that the 4th section does not render the contract absolutely void, but only applies to the mode of procedure upon it."

(*i*) Cahill *v.* Bigelow, 18 Pick. 369; Bohannon *v.* Pace, 6 Dana, 194.

(*j*) Stone *v.* Dennison, 13 Pick. 1. In this case the plaintiff and defendant had entered into a contract by virtue of which the plaintiff was to enter into the defendant's service and continue for several years, at a stipulated rate of compensation. The plaintiff entered into the defendant's service accordingly, and continued for the stipulated time, and the defendant paid him the stipulated compensation. Subsequently this action was brought to recover an additional compensation, upon a *quantum meruit*. The defendant interposed the executed contract as a defence, and was sustained by the court. *Shaw*, C. J., said, "The contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an

Of the other sections of this statute it will not be necessary to say much. Those which relate to wills, lie entirely without the scope of this work; and those in relation to trusts, almost as much so. The first, second, and third sections relate to leases, and these sections are subject to so many important modifications in this country, the provisions respecting them in the several States, being not only diverse from the statute, but from each other, that an examination of the questions which have arisen under the English statute, and of the adjudication which has settled these questions, would not be of much use.

It should be said, however, that equity has held that a part-performance of a contract takes the case out of the statute; either on the ground of fraud, (*k*) or on the presumption of an unproved agreement which satisfies the require-

executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit*, as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought, whereby to charge any person upon any agreement, which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties resulting from such performance, stand unaffected by the statute. In the case of Boydell *v.* Drummond, 11 East, 142, a case was put in the argument, of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract was the payment of the price, which was not to be performed within the year, a question is made, whether, by force of the statute, the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said Lord *Ellenborough*, "the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract, on the one part; and the question of consideration only would be reserved to a future period." If a performance upon one side would avoid the operation of the statute, *a fortiori* would the entire and complete performance on both sides have that effect. Take the common case of a laborer, entering into a contract with his employer, towards the close of a year, for another year's service, upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action, whereby to charge the other upon such contract. But it would be a very different question, were the contract fulfilled upon both sides, by the performance of the services on the one part, and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit* and recover more, or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received, and recover back part of the money advanced, on the ground, that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of opinion, that it has no application to executed contracts, and that the evidence of this contract was rightly admitted." And see *ante*, p. 319.

(*k*) See Roberts on Frauds, p. 130, *et seq.*

ments of the statute. (*l*) Much doubt has been expressed as to the wisdom or expediency of this rule; (*m*) but it seems now to be well established. But the efforts to make the same rule operative at law, (*n*) have wholly failed; and the dicta which assert this rule at law, have been overruled. (*o*) And even in equity, it is established with some qualifications, or, rather, requirements. Thus, nothing is a part performance for this purpose, which is only ancillary or preparatory; (*p*) it must be a direct act which is intended to be a substantial part of the performance of an obligation created by the contract; (*q*) and it must be an act which would not have been done but for the contract; (*r*) and it must be directly in prejudice of the party doing the act, who must himself be the party calling, on this ground, for the completion of the contract. (*s*)

(*l*) See Roberts on Frauds, p. 130, *et seq.*

(*m*) See Lindsay *v.* Lynch, 2 Sch. & Lef. 1; Forster *v.* Hale, 3 Ves. 696, 712.

(*n*) Brodie *v.* St. Paul, 1 Ves. Jr. 326; Davenport *v.* Mason, 15 Mass. 85.

(*o*) Cooth *v.* Jackson, 6 Ves. 39; Kidder *v.* Hunt, 1 Pick. 331; Adams *v.* Townsend, 1 Met. 483; Norton *v.* Preston, 15 Maine, 14; Jackson *v.* Pierce, 2 Johns. 224.

(*p*) See Roberts on Frauds, p. 139.

(*q*) Jones *v.* Peterman, 3 S. & R. 543; Johnston *v.* Glancy, 4 Blackf. 94; Morphett *v.* Jones, 1 Swanst. 172; Hooper, ex parte, 19 Ves. 477.

(*r*) Frame *v.* Dawson, 14 Ves. 386; Gunter *v.* Halsey, Ambl. 586; Phillips *v.* Thompson, 1 Johns. Ch. 149.

(*s*) See Roberts on Frauds, p. 138.

CHAPTER V.

THE STATUTE OF LIMITATIONS.

Sect. 1.—*The General Purpose of the Statute.*

Any tribunal which inquires into the validity of a claim, must admit that its age is among the elements which determine the probability of its having a legal existence and obligation. The natural course of events is for him who owes a debt, to pay it; and for him to whom a debt is due, to demand it; and conduct which is opposite to this, is exceptional. And human experience tells us, that it is very rare, in point of fact, for a creditor to let a claim which is enforceable at law, lie for a long period, not only unpaid, but uncalled for. This improbability the common law recognized; and when the claim was old enough, it considered the improbability too strong to be overthrown by the mere fact of an original debt, and no evidence of payment; in other words, it raised a presumption of payment after many years; this period is generally, now almost universally, twenty years; and it still applies to all personal claims which are not limited by the statute of limitations. (*t*) But this was not an absolute presumption, because it could be rebutted by acts or words on the part of the debtor, which were incompatible with such payment. At length, the statute, 21 James I., c. 16, enacted, among other things, that all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, and all actions of debt for arrearages of rent, should be commenced and sued within six years next after the cause of such actions or suit, and not after.

(*t*) Duffield *v.* Creed, 5 Esp. 52; Cooper *v.* Turner, 2 Stark. 497; Christophers *v.* Sparke, 2 Jac. & Walk. 223.

It is not quite certain, from the selection of the claims to which this statute applies, whether it proceeded upon the same ground as the legal presumption; that is, actual probability of payment; for while these claims are such as would very seldom be suffered to be long unsettled, and the excepted claims, as those of accounts between merchants, and those grounded on specialty, are often permitted to go on without liquidation for a considerable period, it is also true that this latter class of claims might become old without becoming stale, and should be excepted from a statute of limitations which went on the ground that the actions which it prohibited ought not to be brought after a certain time, whether the debts were paid or not, because they ought not to be suffered to lie unsettled so long. And some of the earlier decisions of the questions which soon arose under this statute, would lead to the supposition that the courts then regarded it as a statute of repose, and not one of presumption. (*u*) Soon, however, the other view prevailed; and a long course of decisions occurred, which can be justified and explained only on the supposition that the statute is to be construed as one of presumption, and of rebuttable presumption. (*v*) Gradually, however, this view gave way to the other; and it may now be considered as the established rule, that the statute proceeds upon the expediency of refusing to enforce a stale claim, whether paid or not, and not merely on the probability that a stale claim has been paid; and this expediency is the actual basis of the law

(*u*) Bland *v.* Haselrig, 2 Vent. 151; Dickson *v.* Thompson, 2 Show. 125; Lacon *v.* Briggs, 3 Atk. 105; Bass *v.* Smith, 12 Vin. Abr. 229, pl. 4; Owen *v.* Wolley, Bull. N. P. 148; Andrews *v.* Brown, Prec. in Ch. 386; Heyling *v.* Hastings, 1 Ld. Raym. 389, 421; Sparling *v.* Smith, id. 741.

(*v*) Yea *v.* Fouraker, 2 Burr. 1099; Quantock *v.* England, 5 Burr. 2628; Richardson *v.* Fen, Lofft, 86; Lloyd *v.* Maund, 2 T. R. 760; Catling *v.* Skoulding, 6 id. 189; Lawrence *v.* Worrall, Peake, N. P. 93; Clarke *v.* Bradshaw, 3 Esp. 155; Bryan *v.* Horseman, 5 Esp. 81, 4 East, 599; Rucker *v.* Hannay, 4 East, 604, n. (a); Gainsford *v.* Grammar, 2 Camph. 9; Leaper *v.* Tatton, 16 East, 420; Loweth *v.* Fothergill, 4 Camph. 184; Dowthwaite *v.* Tibbut, 5 M. & S. 75; Beale *v.* Nind, 4 B & Ald. 568; Clark *v.* Hougham, 2 B. & Cr. 149; Frost *v.* Bengough, 1 Bing. 266; Colledge *v.* Horn, 3 Bing. 119; Triggs *v.* Newnham, 1 C. & P. 631; East India Co. *v.* Prince, Ry. & M. 407; Sluby *v.* Champlin, 4 Johns. 461; De Forest *v.* Hunt, 8 Conn. 179; Aiken *v.* Benton, 2 Brevard, 330; Lee *v.* Perry, 3 McCord, 552; Glenn *v.* McCullough, Harper, 484; Burden *v.* M'Elhenny, 2 Nott & McCord, 60; Sheftall *v.* Clay, R. M. Charlt. 7.

of limitations. This change we deem one of extreme importance. The tendency to it caused much of the conflict and uncertainty which attended the adjudication upon this statute in England. The prevalence of the new view gave rise at length to Lord *Tenterden's* act in England, (*w*) which has been adopted in many of our States, and found to work very beneficially; and in the construction of this statute, or in the consideration of questions arising under the earlier statutes of limitations where they remain in force, we consider that the principle which will hereafter be applied, will be that which regards the statute of limitations as a statute, not of presumption, but of repose.

A very little observation will show that these two views lead to results which are not only distinctly different, but antagonistic. This difference may be stated thoretically thus: If the statute of limitation be a statute of presumption, then it is taken away by whatever will rebut the presumption; and this is anything which implies or amounts to an acknowledgment that the debt still exists. But if it be a statute of repose, then it remains in force, unless the debtor renounces its benefit and protection, and voluntarily makes a new promise to pay the old debt. It is true, that immediately after the enactment of the statute of James, if the statute were pleaded, the only replication was "a new promise." But when issue was joined on this replication, the plaintiff made out his case by showing only a new acknowledgment. And it was a gradual progress in the courts, which finally led them to require that this acknowledgment should be such, in fact, as amounted to a promise. Thus, Lord *Mansfield* said, (*x*) "The slightest acknowledgment has been held sufficient; as saying, 'Prove your debt and I will pay you;' 'I am ready to account, but nothing is due to you.' And much slighter acknowledgments than these will take a case out of the statute." And in our notes will be seen decisions or dicta which are not less extreme. (*y*) But on what prin-

(*w*) 9 Geo. IV. c. 14.

(*x*) In Trueman *v.* Fenton, Cowp. 548.

(*y*) Thus, in Richardson *v.* Fen, Lofft, 86, it appeared that the defendant met a man in a fair, and said he went to the fair to avoid the plaintiff to whom he was indebted. This was held to be a sufficient acknowledgment to take the case out of the statute, there being no other debt between them. And in Lloyd

ciple can they rest for a moment, excepting that which looks upon limitation as founded on actual probability of payment. And connected with these decisions grew up an opinion among courts, that the plea of the statute was dishonorable, and not to be favored. (z) So late as in 1830, Mr. Justice *Story* (a) spoke very strongly, — in a passage we shall presently have occasion to quote at length, — of his own recollection of an extreme and inexcusable endeavor of the courts to take from the operation of the statute of limitations, all cases in which any words or phrases of the supposed debtor could be strained into an admission of the debt. But even so early as in 1702, it was said by the Court of King's Bench, (b) that "'The statute of limitations, on which the security of all men depends, is to be favored." And we give in a note, acknowledgments which have been held insufficient to take the case out of the statute, although, if the authorities stated in a previous note had been fol-

v. Maund, 2 T. R. 760, it was held that a letter written by the defendant to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounted to an acknowledgment of the debt, so as to take it out of the statute. And *Ashhurst*, J., said, "It is certainly true that any acknowledgment will take the case out of the statute of limitations. Now though this letter is written in ambiguous terms, there are some parts of it, from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it the defendant does not deny the existence of the debt." So in Bryan *v.* Horseman, 4 East, 599, it was *held* that an acknowledgment of a debt, though accompained with a declaration by the defendant "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," was sufficient to take the case out of the statute. So in Leaper *v.* Tatton, 16 East, 420, in assumpsit against the defendant as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*. And Lord *Ellenborough* said, "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumption of payment, if his own acknowledgment that he has not paid be shown, it does away the statute." And again, in Clark *v.* Hougham, 2 B. & Cr. 154, *Bayley* said, "The statute of limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and the vouchers lost. Wherever it appears, by the acknowledgment of the party, that it is not paid, that takes the case out of the statute. Leaper *v.* Tatton, 16 East, 420; Dowthwaite *v.* Tibbut, 5 M. & S. 75. And according to those cases, it makes no difference, whether the acknowledgment be accompained by a promise or refusal to pay. Mountstephen *v.* Brooke, 9 B. & Ald. 141, shows that an acknowledgment to a third person is sufficient."

(z) Willet *v.* Atterton, 1 Wm. Bl. 35; Perkins *v.* Burbank, 2 Mass. 81.

(a) In Spring *v.* Gray, 5 Mason, 523.

(b) In Green *v.* Rivett, 2 Salk. 421.

lowed, most of these, if not all, must have been held sufficient to constitute a new promise. (*c*) And at length, through

(*c*) Thus, in A'Court *v.* Cross, 3 Bing. 329, defendant, being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three penny receipt stamp, and I will never pay it;" this was held not such an acknowledgment as would revive the debt against a plea of the statute of limitations. And per *Best*, C. J., "The courts have said, acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the statute. I cannot reconcile this doctrine, either with the words of the statute, or the language of the pleadings. The replication to the plea of non-assumpsit *infra sex annos* is, that the defendant did undertake and promise within six years. The mere acknowledgment of a debt is not a promise to pay it: a man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it; yet without regarding the circumstance under which an acknowledgment was made, the courts, on proof of it, have presumed a promise. It has been supposed that the legislature only meant to protect persons who had paid their debts, but from lapse of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say, that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it, the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts." So in Ayton *v.* Bolt, 4 Bing. 105, where the defendant being applied to to pay a debt barred by the statute of limitations, said he should be happy to pay it if he could; it was held that the plaintiff must show the defendant's ability to pay, the court saying that the case fell within the rule laid down in A'Court *v.* Cross. And in Tanner *v.* Smart, 6 B. & Cr. 603, in assumpsit, brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years; "I cannot pay the debt at present, but I will pay it as soon as I can;" *Held*, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. And Lord *Tenterden* said, "There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged. But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded, appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought, at least, to grant a new trial, that the opportunity may be offered of having the decision of a court of error upon the point, and that for the future we may have a correct standard by which to act. . . . . If an acknowledgment had the effect, which the cases in the plaintiff's favor attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied

a series of decisions, going to show that the statute is intended for the relief and quiet of defendants, the law reached the conclusion justly and forcibly expressed by Mr. Justice *Story*, in the case to which we have before referred. (*cc*) He says, "I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose; the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure, from the lapse of time, or the defective memory, or death, or removal of wit-

upon it as a bar to the statute; whereas the constant replication, ever since the statute, to let in evidence of an acknowment, is, that the cause of action accrued (or the defendant made the promise in the declaration) within six years; and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, (though it may show clearly *that the debt never has been paid*, but is still a subsisting debt,) the plaintiff fails." His lordship then proceeds to an elaborate review of the authorities, and continues; — "All these cases proceed upon the principle that under the ordinary issue on the statute of limitations an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect." And see Fearn *v.* Lewis, 4 M. & P. 1; Brigstocke *v.* Smith, 1. C. & M. 483; Haydon *v.* Williams, 7 Bing. 163; Cory *v.* Bretton, 4 C. & P. 462; Morrell *v.* Freth, 3. M. & W. 402; Routledge *v.* Ramsay, 8 Ad. and El. 221; Williams *v.* Griffith, 3 Exch. 335; Cawley *v.* Furnell, 12 C. B. 291; Smith *v.* Thorn, 10 Eng. Law and Eq. 391; Hart *v.* Prendergast, 14 M. & W. 741. In this last case *Parke*, B., said, "There is no doubt of the principle of law applicable to these cases, since the decision in Tanner *v.* Smart; namely, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay, coupled with a condition, he must show performance of the condition; so as in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of Tanner *v.* Smart put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again." For recent American cases to the same effect, see Gilkyson *v.* Larue, 6 W. & S. 213; Morgan *v.* Walton, 4 Penn. St. 321; Laforge *v.* Jayne, 9 id. 410; Christy *v.* Flemington, 10 id. 129; Gillingham *v.* Gillingham, 17 id 303; Kyle *v.* Wells, id. 286; Bell *v.* Crawford, 8 Gratt. 110; Ross *v.* Ross, 20 Ala. 105; Ten Eyck *v.* Wing, 1 Manning, (Mich.) 40; Butterfield *v.* Jacobs, 15 N. H. 140; Ventris *v.* Shaw, 14 id. 422; Sherman *v.* Wakeman, 11 Barb. 254; Ellicot *v.* Nichols, 7 Gill, 85; Mitchell *v.* Sellman, 5 Maryland. 376; Carruth *v.* Paige, 22 Verm. 172; Cooper *v.* Parker, 25 id. 502; Hill *v.* Kendall, id. 528; Brainard *v.* Buck, id. 573; Pritchard *v.* Howell, 1 Wisconsin, 131; Deloach *v.* Turner, 6 Rich. 117, 7 id. 143; Butler *v.* Winters, 2 Swan, (Tenn.) 91. And see the leading case of Bell *v.* Morrison, 1 Pet. 351.

(*cc*) See *ante*, p. 344, n. (*a*.)

nesses. The defence, therefore, which it puts forth, is an honorable defence, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected are unfounded, or at least are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their over confidence in regard to transactions which have become dim by age. Yet, I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admissions of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation."

SECTION II.

OF A NEW PROMISE.

The law may not be yet entirely settled, as to what shall constitute the new promise which removes the bar of the statute. But, without now taking into consideration Lord *Tenterden's* act, requiring the new promise to be in writing, we think we may draw from the multitudinous decisions on the subject, the following conclusions, as established law.

The first and most general of these is, that there must be either an express promise, or an acknowledgment expressed in such words, and attended by such circumstances as give

to it the meaning, and therefore the force and effect of a new promise. (*d*) Such, we think, the rule, although it must be admitted that it has been sometimes applied, even of late, with great laxity.

Whether an acknowledgment is thus equivalent to a new promise, or is sufficient to remove the bar of the statute, is a question which must be determined either by the court or the jury; and it does not seem to be quite settled within which province it lies. We should say, however, in general, that where this question is one of intention, and is to be gathered from the words spoken, and from the circumstances of the case to be considered in connection with the words, there it is for the jury, under the instruction of the court as to the principles applicable to the question, to determine whether the acknowledgment be sufficient or not. But where the question is one of the meaning of words only, and especially where the words relied upon are written, and the question becomes, in effect, one of the construction of a written document, there it is the duty of the court to make, and of the jury to receive, a distinct direction. (*e*)

(*d*) See upon this point the leading case of Tanner *v.* Smart, 6 B. & Cr. 603, cited in the preceding note. "According to the recent cases," says *Parke*, B., in Morrell *v.* Frith, 3 M. & W. 405, "the document, in order to take the case out of the statute, must either contain a promise to pay the debt on request, or an acknowledgment from which such promise is to be inferred." In Hart *v.* Prendergast, 14 M. & W. 746, *Rolfe*, B., said "The principle is said to be, that the document must contain either a promise to pay the debt, or an acknowledgment from which such a promise is to be inferred. Perhaps it would be more correct to say, that it must, in all cases, contain a promise to pay, but that from a simple acknowledgment the law implies a promise; but there must, in all cases, be *a promise*, in order to support the declaration." Again, in Bell *v.* Morrison, 1 Pet. 362, Mr. Justice *Story* says, "If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved, in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by prejuries." See further the English and American cases cited in the preceding note.

(*e*) In Lloyd *v.* Maund, 2 T. R. 760, the acknowledgment was contained in

It is not necessary that the acknowledgment should be of any precise amount; (*f*) but if there be an admission of any debt, and of legal liability to pay it, evidence may be connected with this admission to show the amount; (*g*) and even if the parties differ as to the amount, an admission of the debt may remove the bar of the statute. (*h*) But the acknowledgment must not be of a mere general indebtedness. (*i*) It must be, on the one hand, broad enough to include the specific debt in question, (*j*) and on the other, sufficiently precise and definite in its terms to show that this debt was the subject-matter of the acknowledgment. (*k*) So a general direction to pay debts, or a general provision for their payment, does not operate as a new promise by the testator. (*l*)

As the acknowledgment must be such as to be equivalent to a promise, if it be in other respects full and complete, but

a letter, and yet the question whether the acknowledgment was sufficient was submitted to the jury. The same course was pursued in Frost *v.* Bengough, 1 Bing. 266. And in Bird *v.* Gammon, 3 Bing. N. C. 883, where the like course was pursued, and a new trial was moved for, on that among other grounds, *Tindal*, C. J., said, "The first objection taken for the defendant is, that it was left to the jury to say what was the effect of the letter. But by a chain of cases, from Lloyd *v.* Maund to Frost *v.* Bengough and others, it appears that such has been the constant course." But the authority of these cases was much shaken, if not entirely overthrown, by the case of Morrell *v.* Frith, 3 M. & W. 402. See *ante*, p. 4 and 5. And see Clarke *v.* Dutcher, 9 Cow. 674; Chapin *v.* Warden, 15 Verm. 560; Martin *v.* Broach, 6 Geo. 21; Love *v.* Hackett, id. 486; Watkins *v.* Stevens, 4 Barb. 168.

(*f*) Thus, in Dickinson *v.* Hatfield, 1 M. & Rob. 141, Lord *Tenderden* ruled that a promise to pay "the balance" due, is sufficient to take a case out of the statute of limitations, although no mention is made of the amount of the balance. And see, to the same effect, Lechmere *v.* Fletcher, 1 Cr. & M. 623; Bird *v.* Gammon, 3 Bing. N. C. 883; Waller *v.* Lacy, 1 M. & G. 54; Gardner *v.* M'Mahon, 3 Q. B. 561; Williams *v.* Griffith, 3 Exch. 335; Hazlebaker *v.* Reeves, 12 Penn. St. 264; Davis *v.* Steiner, 14 id. 275; Dinsmore *v.* Dinsmore, 21 Maine, 433.

(*g*) Cheslyn *v.* Dalby, 4 Y. & Col. 238; Spong *v.* Wright, 9 M. & W. 629; Barnard *v.* Bartholomew, 22 Pick. 291. See also cases cited in preceding note. But see Kittrege *v.* Brown, 9 N. H. 377.

(*h*) Colledge *v.* Horn, 3 Bing. 119; Gardner *v.* M'Mahon, 3 Q. B. 561.

(*i*) Moore *v.* Hyman, 13 Ired. 272; Shaw *v.* Allen, 1 Busbee, (N. Car.) 58; McBride *v.* Gray, id. 420; Robbins *v.* Farley, 2 Strobh. 348; Harbold *v.* Kuntz, 16 Penn. St. 210.

(*j*) Barnard *v.* Bartholomew, 22 Pick. 291.

(*k*) Id.; Stafford *v.* Bryan, 3 Wend. 532; Arey *v.* Stephenson, 11 Ired. 86; Martin *v.* Broad, 6 Geo. 21; Clarke *v.* Dutcher, 9 Cow. 674. But if only one debt is shown to exist, the acknowledgment will be presumed to refer to that. Woodbridge *v.* Allen, 12 Met. 470; Guy *v.* Tams, 6 Gill, 82.

(*l*) Bloodgood *v.* Bruen, 4 Sandf. 427; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Carrington *v.* Manning, 13 Ala. 611; Braxton *v.* Wood, 4 Gratt. 25; Murray *v.* Mechanics' Bank, 4 Edw. Ch. 567; Walker *v.* Campbell, 1 Hawks, 304; Freake *v.* Cranefeldt, 3 My. & Cr. 499; Evans *v.* Tweedy, 1 Beav. 55.

is expressly guarded and qualified by the maker so that it negatives a promise, or cannot be construed into a promise, it is not sufficient. (*m*) As, if the debtor says, "I know that I owe the money, but I have a legal defence, and will not pay it," this is not enough to prevent the operation of the statute; (*n*) and therefore we say that the acknowledgment must be not only of the debt, but of a legal liability to pay the debt. It is true that the *naked* acknowledgment of the debt implies, and as it were contains, an acknowledgment of legal liability; but there is no room for this implication, where this liability is denied and excluded; *because* the statute is not one of presumption, but of repose. Therefore, also, the acknowledgment may be conditional, or subject to whatever qualification the debtor thinks proper to make. And in that case, the acknowledgment becomes a new promise, or, in other words, the bar of the statute is removed, only when the creditor can show that the condition has been performed; or that the event has happened, or the time arrived, by a reference to which the acknowledgment was qualified. (*o*) And if an acknowledgment be on its face, or in its direct meaning, full and unconditional, it is competent to show, by other admissible evidence, as of the *res gestæ*, that it was not intended as an acknowledgment, but for a different purpose. (*p*) And by parity of reason, it would

(*m*) In Tanner *v.* Smart, 6 B. & Cr. 609, Lord *Tenderden* said, "Upon a a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?" And see the cases cited *ante*, 345, n. (*c.*)

(*n*) A'Court *v.* Cross, 3 Bing. 329. In this case the defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three penny receipt stamp, and I will never pay it;" and this was *held* not such an acknowledgment as would revive the debt against a plea of the statute of limitations. And *Best*, C. J., said, "There are many cases from which it may be collected, that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute of limitations." So in Danforth *v.* Culver, 11 Johns. 146, which was an action on a promissory note, to which the statute of limitations was pleaded, it appeared that within a year of the trial and after the commencement of the suit, the defendant, on being shown the note, admitted that he had executed it, but said it was outlawed, and that he meant to avail himself of the statute of limitations; and this was held not to be sufficient evidence of a promise to pay within six years.

(*o*) Tompkins *v.* Brown, 1 Denio, 247; Hill *v.* Kendall, 25 Verm. 528; Humphreys *v.* Jones, 14 M. & W. 1; Butterfield *v.* Jacobs, 15 N. H. 140. And see cases cited *ante*, p. 345, n. (*c.*)

(*p*) Cripps *v.* Davis, 12 M. & W. 159.

seem to be competent to show that doubtful expressions were meant and understood by the parties to operate as a condition or qualification.

The acknowledgment must be voluntary; (*q*) but whether this applies to admissions made under process of law, as by a bankrupt on his examination, is not quite certain; but the present weight of authority is, perhaps, in favor of the sufficiency of this acknowledgment. (*r*) We should doubt, however, whether this bare acknowledgment ought to be held as the equivalent of a new promise.

It is uncertain whether every new item and credit in a mutual and running account, given by one party to the other, is an admission and acknowledgment of an unsettled account, and evidence of a promise to pay the balance, whatever that account and balance may appear to be, so as to take the whole account out of the statute. The affirmative of this question is maintained by numerous decisions; (*s*) but we

(*q*) Arnold *v.* Downing, 11 Barb. 554.

(*r*) In Eicke *v.* Nokes, 1 M. & Rob. 359, it was *held* that an entry, in a bankrupt's examination, of a certain sum being due to A., is a sufficient acknowledgment to take the case out of the statute of limitations. But in Brown *v.* Bridges, 2 Miles, 424, where A. & B., being indebted to C., filed their petition for the benefit of the insolvent laws, in which they stated, in their schedule of debts, the debt due to C.; it was *held* that this was not a sufficient acknowledgment to take the debt out of the statute. And the court said, "An *acknowledgment* of a debt, to prevent the operation of the statute of limitations, must at least be consistent with a *promise* to pay. This is the law in Pennsylvania. The acknowledgment in defendant's petition for the benefit of the insolvent laws is not of this character, for the very basis on which an insolvent asks his discharge is that he is *unable* to pay his debts. How this can be tortured into a promise to pay, or as being consistent with such a promise, we are at a loss to discover." And see, to the same effect, Christy *v.* Flemington, 10 Penn. St. 129. See further Kennett *v.* Milbank, 8 Bing. 38; Wellman *v.* Southard, 30 Maine, 425; Pott *v.* Clegg, 16 M. & W. 321.

(*s*) A leading case upon this point is Catling *v.* Skoulding, 6 T. R. 189. It was there held, that if there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. And Lord *Kenyon* said, "It is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is, whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us that if this rule be now overturned, it will lead to infinite injustice." Perhaps this decision is consistent with the views then prevailing in respect to new pro-

think these decisions are inconsistent with the views which now prevail in regard to new promises and acknowledg-

mises and acknowledgments; but it is submitted that it cannot be sustained upon principle, since the decision in Tanner *v.* Smart in England, and Bell *v.* Morrison in this country. And this is the view adopted by the Superior Court of New Hampshire, in Blair *v.* Drew, 6 N. H. 235; though some of the reasoning of *Parker*, J., goes even further. In delivering the judgment of the court, he says, "Upon what principle is it, that a sale of an article upon credit is an admission of anything else except that the subject-matter of that transaction had existence? Upon what principle does it admit the existence of an unsettled account upon the other side, or draw after it anything else? If, in the nature of things, there could not be an account consisting of a single item, it might well be said that the charge of one item was an admission of something more. If, in the ordinary transaction of business, there could not be an account upon one side, without an account upon the other to balance it, in whole or in part, there would be some foundation for such admission. But every day's experience negatives all this; accounts exist upon one side only; and of no more than a single item. The purchase is made—the credit is given—and this is all the dealing between the parties. Many of the decisions upon the statute of limitations, much controverted, if not exploded, were founded on the asumption, that the statute was based upon a presumption of payment, and of consequence any admission that the debt was unpaid rebutted the presumption and took the case out of the statute. Granting the premises, the conclusion followed well enough. But even upon that view of the statute, the position is wholly untenable that an item of credit constitutes an admission of another pre-existing debt upon the other side, and an admission, moreover, that it has not been paid. Aside from the statute of limitations, such doctrine of admission would receive no countenance whatever. No jurist would ever argue, that because he had proved one item of account, it was any evidence from which a jury might infer and find other distinct and independent items. Still less would it be contended that an account, proved by the plaintiff, was an admission which furnished evidence in favor of another account of independent items, offered by the defendant, or that it was of any weight to prove the defendant's account, even in connection with other evidence. And if it furnishes no evidence of admission, in such case, it can raise no fair admission as against the statute. No admission, then, of any account upon the other side, can be fairly inferred from the act of making a charge on account against any individual. It is no admission of an unsettled account, beyond the very charge itself. It does not imply that the party giving the credit has any other item of claim against the party charged. Still less does it imply that the party against whom the charge is made, has an account to balance it, in whole, or in part. It is of itself a distinct and independent transaction; and it might with just as much propriety be said that a party making a charge of an item of account, thereby admits that it is paid, in whole or in part, as to say that he thereby admits the existence of an unsettled account against himself. Nay, it would be safer for the individual to hold him as making such an admission, which could extend no farther than in discharge of the demand which constituted the acknowledgment; whereas, holding the admission to extend to an unsettled account against himself, may subject him, in connection with fabricated evidence, or from a loss of vouchers or testimony, to the payment of pretended claims upon the other side, of an amount vastly beyond the small item, by the charge of which he has drawn down such consequences upon himself. We cannot deem it any objection to our reasoning upon this subject, that there may be cases where an account upon one side may be recovered, while one upon the other side of older date is barred. If it be so it will arise from the *laches* of the party. If articles upon one side are delivered in payment of a prior existing account upon the other, the delivery raises no cause of action. If not delivered in payment, each account is distinct and independent, as much so as promissory notes held upon the one side and the other; and there is as much reason why a party should not avail

ments; and we doubt whether they would be followed in any jurisdiction where the question is still open.

SECTION III.

OF PART PAYMENT.

A part payment of a debt has always been held to take it out of the statute; (*t*) the six years being counted from such payment. And this is so, though the payment is made by goods, or chattels, which it is agreed shall be given and received as payment. (*u*) And even where the debtor gives the creditor his negotiable promissory note or bill of exchange, on account of a larger debt, (*v*) it is held to operate

himself of an account, which is barred by the statute, in discharge of another account due from him, and to which he has no other defence, as there is that he should not avail himself of a promissory note which is barred, in the same way, or that he should not recover that, or any other demand which is barred, in an independent suit upon the demand itself. We have endeavored to examine this subject with all the care and attention which the importance of the principle involved, and a high respect for the learned tribunals whose decisions have been adverse to the opinion now expressed, demand of us. Consistently with the principles of repeated decisions in this court, that in order to raise a new promise by implication from an acknowledgment, it must contain a direct and unqualified admission of a subsisting debt, which the party is liable and willing to pay; we cannot hold that one item in an account has of itself any force or effect to take other items, which would otherwise be barred, out of the statute." And the same view is adopted in Kentucky. Lansdale *v.* Brashear, 3 Monr. 330; Smith *v.* Dawson, 10 B. Monr. 112. And in Tennessee. Craighead *v.* The Bank, 7 Yerg. 399. But it must be admitted that the main current of American decisions is still in accordance with Catling *v.* Skoulding. See Kimball *v.* Brown, 7 Wend. 322; Chamberlain *v.* Cuyler, 9 id. 126; Sickles *v.* Mather, 20 id. 72; Todd *v.* Todd, 15 Ala. 743; Wilson *v.* Calvert, 18 id. 274; Cogswell *v.* Dolliver, 2 Mass. 217; Davis *v.* Smith, 4 Greenl. 337; Abbott *v.* Keith, 11 Verm. 529; Hodge *v.* Manley, 25 id. 210. But, see the opinions of the learned judges in the two last cases. In England this question was set at rest by Lord *Tenterden*'s act, very soon after Tanner *v.* Smart was decided. See Williams *v.* Griffiths, 2 Cr. M. & Ros. 45; Mills *v.* Fowkes, 7 Scott, 444; Cottam *v.* Partridge, 4 Scott, N. R. 819. Care must be taken not to confound the above cases with cases concerning "merchants' accounts," which we shall consider hereafter.

(*t*) Whipple *v.* Stevens, 2 Fost. 219. In this case the Court say, "It is well settled that a partial payment of a debt amounts to an acknowledgment of a present subsisting debt, which the party is liable and willing to pay; from which, in the absence of any act or declaration on the part of the party making the payment, inconsistent with the idea of a liability and willingness to pay, a jury may and ought to infer a new promise." And see cases cited *infra*.

(*u*) Hart *v.* Nash, 2 Cr. M. & Ros. 337; Hooper *v.* Stephens, 4 Ad. & El. 71; Cottam *v.* Partridge, 4 Scott, N. R. 819.

(*v*) This was decided in Massachusetts, in the case of Ilsley *v.* Jewett, 2 Met. 168. But the decision was put

as part payment. It must, however, be certain, that payment is made only as a part of a larger debt; for in the

upon the ground that in that State the giving of such note or bill is *primâ facie* evidence of payment and discharge of the debt for which it is given. A similar decision, however, has been made in the recent case of Turney *v.* Dodwell, 24 Eng. Law & Eq. 92, in England, where no such rule prevails. That was an action by the plaintiff, as payee of a promissory note against the defendant, as maker. The defendant pleaded the statute of limitations. It appeared upon the trial that the defendant, being indebted to the plaintiff, on the 5th of May, 1843, gave to him the note sued on, for 108*l.* 15*s.* In February, 1848, the defendant, having been pressed to pay part of the debt, accepted a bill of exchange, drawn upon him by the plaintiff, for 30*l.*, in part payment of the promissory note. And this was held sufficient to take the note out of the statute of limitations. Lord *Campbell*, in delivering the judgment of the court, said, "The only question in this case was, whether a part payment by a bill of exchange, drawn by the plaintiff and accepted by the defendant, was sufficient to take the case out of the statute of limitations. The circumstances under which the acceptance was given, were such as to show that the payment was made as a part payment of the whole amount due, so as to raise the implication of a fresh promise, and therefore, to be an answer to the defence of the statute of limitations, if the part payment by bill were a part payment within the 9 Geo. 4, c. 14. It was said, on the part of the defendant, and we think correctly, that we ought to assume that the payment in question was not an absolute payment in satisfaction, so as to be a discharge if the bill were dishonored. If the payment had been one of absolute satisfaction, no question could have arisen; and we have, therefore, to consider whether the payment in the usual manner in which bills of exchange are given and taken in payment is a payment within the proviso of the 9 Geo. 4, c. 14, by which the effect of part payment is preserved. The counsel for the defendant referred us to the case of Gowan *v.* Forster, 3 B. & Ad. 507, where a doubt was expressed as to whether the drawing of a bill was a sufficient acknowledgment, within the 9 Geo. 4, c. 14, and to the case of Foster *v.* Dawber, 6 Exch. 839, where the Court of Exchequer thought that under the circumstances no promise to pay any balance could be implied in the particular case; but there is nothing to show that they thought that a part payment by bill, might not be an acknowledgment, to take the case out of the statute of limitations, as to the remainder. On the other hand, in the case of Irving *v.* Veitch, 3 M. & W. 90, the expressions used by the learned barons lead us to suppose that they thought such part payment by bill sufficient. In both Gowan *v.* Forster and Irving *v.* Veitch, it was unnecessary to determine the point now in question, as the courts most properly held that the acknowledgment, if any, was at the time of delivering the bills in part payment, and not at their subsequent payment by the parties on whom the bills in those cases were drawn. At the trial, in the present case, the Lord Chief Justice of the Common Pleas held, that the part payment was sufficient to take the case out of the statute of limitations, and we entirely concur in that ruling. Before the statute 9 Geo. 4, such a part payment was clearly sufficient to take the case out of the statute of limitations, as amounting to an acknowledgment of the balance being due; and the real question is, whether such payment by bill, though not received, in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt is laid down by *Maule*, J., in the recent case of Belshaw *v.* Bush, 11 C. B. 191, approving the doctrine of the Court of Exchequer, in Griffiths *v.* Owen, 13 M. & W. 58, and of *Alderson*, B., in James *v.* Williams, 13 M. & W. 833. In all those authorities such a delivery of a bill is laid down as a conditional payment. We do not see why its immediate operation, as an acknowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statutes intending to make a distinction between mere acknowledgments, by word of mouth, and acknowledgments proved by the act of payment, it surely cannot be material whe-

absence of conclusive testimony, it will not be deemed an admission of any more debt than it pays. (*w*)

ther such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention and the act by which it is evinced remain the same. We think that the word 'payment' must be taken to be used by the legislature in a popular sense, and in a sense large enough to include the species of payment in question; and we should think the acknowledgment of liability as to the remainder of the debt not at all altered by the fact of the notes, by which it was paid, turning out to be forged, or of the coin turning out to be counterfeit. In all these cases, the force of the acknowledgment is the same, and the payment is, we think, a sufficient payment within the words of the 9 Geo. 4. In Maillard *v.* The Duke of Argyle, 6 M. & Gr. 40, the Court of Common Pleas distinctly held, that the word 'payment,' as applicable to a transaction of this kind, even when used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense; and *Maule*, J., in that case, says 'that 'payment' is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises.' When you speak of paying by cash, that means in satisfaction, but when by bill, that does not import satisfaction unless the bill is ultimately taken up. In Belshaw *v.* Bush, the Lord Chief Justice of the Common Pleas, in speaking of a transaction of this nature, says, 'The real answer is, that upon this record you have been paid your debt;' and in the very report now before us, the learned Lord Chief Justice calls the present transaction a part payment. In mercantile transactions, nothing is more usual than to stipulate for a payment by bills, where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word 'payment,' and that it is clearly within the class of acknowledgments intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction. The defendant's case, which rested entirely on the proviso in the 9 Geo. 4, being so restricted, therefore fails in its foundation; and we think that where a bill of exchange has been so delivered in payment, on account of the debt, as to raise an implication of a promise to pay the balance, the statute of limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill."

(*w*) Tippets *v.* Heane, 1 Cr. M. & Ros. 252. This was an action of assumpsit, for meat, lodging, &c., furnished by the plaintiff for the defendant's son. The defendant pleaded the general issue. At the trial, before *Vaughan*, B., the plaintiff, to take the case out of the statute, proved by one A. B. that he had paid 10*l.* to the plaintiff, by the direction of the defendant, in the year 1829; but he could not speak to the account on which it was paid, or give any evidence beyond the mere fact of having paid the money by the defendant's direction. The learned Baron left it to the jury to say, whether the 10*l.* was paid on account of the debt in question; and observed to them that no other account was proved to have existed between the parties. The jury having found a verdict for the plaintiff, the Court of Exchequer granted a new trial, on the ground that there was no sufficient evidence of part payment to go to the jury. And *Parke*, B., said, "In order to take a case out of the statute of limitations, by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not show any particular account, to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and, perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due

If, therefore, a debtor owes his creditor several debts, some of which are barred by the statute of limitations, and some are not, and pays a sum without appropriating it to any particular debt, the creditor cannot appropriate the sum so paid to the debts that are barred, and thereby take them out of the operation of the statute. (*x*) And it seems, that if there are two clear and undisputed debts, both of which are barred by the statute, and money is paid, but not appropriated to either debt by the debtor, the creditor cannot appropriate the payment, and thereby take the debt to which he applies it out of the statute. (*y*) But if one of the debts is admitted, the jury may apply the payment to that debt, rather than to those which are disputed. (*z*) If, however, money be paid, and there is with it an acknowledgment of further debt, and the debtor owes but one debt to the creditor, the payment will be applied to that debt, without words of appropriation by the debtor. (*a*) But if payment be made, and with it words of denial or refusal as to the debt, or the residue of it, are used, this does not take the debt out of the statute. (*b*) If the debt consists of principal and interest, a payment on account of either will take the whole residue of both out of the statute. (*c*) If there be mutual accounts, and a balance be struck, it has been held that this converts the items allowed into a part payment, to take the case out of the statute. (*d*) And a payment, by the debtor *for* the creditor,

at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt. Unless then, in the present case, it could be collected that the payment was in part of a greater debt, the statute was a bar, and there being no evidence from which a jury were warranted in coming to such a conclusion, the present rule must be made absolute." And see to the same effect Linsell *v.* Bonsor, 2 Bing. N. C. 241; Waters *v.* Tompkins, 2 Cr. M. & Ros. 726; Waugh *v.* Cope, 6 M. & W. 824; Wainman *v.* Kynman, 1 Exch. 118; Davies *v.* Edwards, 7 Exch. 22; Smith *v.* Westmoreland, 12 Sm. & Marsh. 663; McCullough *v.* Henderson, 24 Mississippi, 92; Alston *v.* State Bank, 4 Eng. (Ark.) 455; State Bank *v.* Wooddy, 5 id. 638; Wood *v.* Wylds, 6 id. 754; Arnold *v.* Downing, 11 Barb. 654; Hodge *v.* Manley, 25 Verm. 216.

(*x*) Mills *v.* Fowkes, 5 Bing. N. C. 455. But see Ayer *v.* Hawkins, 19 Verm. 26. And see *ante*, p. 141, n. (*h*).

(*y*) Burn *v.* Boulton, 2 C. B. 476.— And see State Bank *v.* Wooddy, 5 Eng. 638; Wood *v.* Wylds, 6 id. 754.

(*z*) Burn *v* Boulton, 2 C. B. 476.

(*a*) Evans *v.* Davies, 4 Ad. and El. 840.

(*b*) Wainman *v.* Kynman, 1 Exch. 118.

(*c*) Parsonage Fund *v.* Osgood, 21 Maine, 176; Bealey *v.* Greenslade, 2 Tyrwh. 121; 2 Cr. & Jer. 61; Sanford *v.* Hayes, 19 Conn. 591; Bradfield *v.* Tupper, 7 E. L. & E. 541.

(*d*) Thus, in Ashby *v.* James, 11 M. & W. 542, it was *held* that, where A. has an account against B., some of the

and at his request, or to one whom the creditor owes, has the same effect as a payment *to* him. (*e*)

Lord *Tenterden's* act provides "That nothing herein contained shall *alter*, or take away, or lessen the effect of any payment of any principal or interest made by any person." Hence, it leaves the fact of part payment to operate as before; but an interesting question has arisen, whether the preceding clause of the act, which requires that the new promise or acknowledgment shall be in writing, requires, by construction or implication, that an admission or acknowledgment of part payment shall be proved or verified by writing. The tendency of the English decisions, for some time, was to require this; (*f*) but when the question arose in this country, it was held that the statute should be construed as leaving the matter of part payment where it was before, both as to the evidence of it, and as to its effect. (*g*) And the same view has recently been adopted in England, in the Exchequer Chamber. (*h*) It has been held, in England, that the written

items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favor, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance, and takes the case out of the operation of the statute of limitations, notwithstanding the provisions of Lord *Tenterden's* act. And Lord *Abinger* said, "I think Lord *Tenterden's* act does not apply at all to the fact of an account stated, where there are items on both sides." [His Lordship read the act.] "This is not an acknowledgment or promise by words only; it is a transaction between the parties, whereby they agree to the appropriation of items on the one side, item by item, to the satisfaction, *pro tanto*, of the account on the other side. The act never intended to prevent parties from making such an appropriation." And *Alderson*, B., said, "The courts have never laid it down that an actual statement of a mutual account will not take the case out of the statute of limitations. They have indeed determined, that a mere parol statement of, and promise to pay, an existing debt, will not have that effect; because to hold otherwise would be to repeal the statute. The truth is, that the going through an account, with items on both sides, and striking a balance, converts the *set-off* into *payments*; the going through an account where there are items on one side only, as was the case in Smith *v.* Forty, 4 C. & P. 126, does not alter the situation of the parties at all, or constitute any new consideration. Here the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set off, against the earlier items of the plaintiff's, leaving the case unaffected either by the statute of limitations or the set-off." And see Worthington *v.* Grimsditch, 7 Q. B. 479.

(*e*) Worthington *v.* Grimsditch, 7 Q. B. 479.

(*f*) See Willis *v.* Newham, 3 Y. & Jer. 518; Waters *v.* Tompkins, 2 Cr. M. & Ros. 723; Bayley *v.* Ashton, 12 Ad. & El. 493; Maghee *v.* O'Neil, 7 M. & W. 531; Eastwood *v.* Saville, 9 id. 615.

(*g*) See Williams *v.* Gridley, 9 Met. 482; Sibley *v.* Lumbert, 30 Maine, 253.

(*h*) Cleave *v.* Jones, 6 Exch. 573.

acknowledgment which the statute requires, must have the actual signature of the party himself, that of his agent not

This was an action on a promissory note, for £350, with interest. The defendant pleaded the statute of limitations. At the trial, the only evidence given by the plaintiff to take the case out of the statute was the following unsigned entry in a book of the defendant, and in her hand-writing: — "1843. Cleave's interest on £350, £17 10s." *Held*, in the Exchequer Chamber, reversing the judgment of the court below, that this was sufficient evidence of payment of interest to the plaintiff to take the case out of the statute of limitations. And Lord *Campbell*, in delivering the judgment of the court, said, "The time has come when Willis *v.* Newham, having been brought before a court of error, must be overruled. The question on this record is, whether an entry in an account book of the defendant, in her hand-writing, by which there is a statement that she has within six years paid interest upon the promissory note on which the action is brought, is evidence for the jury to take the case out of the statute of limitations. It was held by the learned Judge who tried this case, in deference to that decision, that it was not. We are to determine that question. If Willis *v.* Newham was well decided, the learned Judge was fully justified in saying that the entry was not evidence to go to the jury; for this very case is put in Willis *v.* Newham, and it is there asked, whether such an acknowledgment would be sufficient; and the learned Baron who delivered the judgment of the court, answers 'no; because the act says, the defendant shall not be charged except by an acknowledgment in writing, signed by him.' Does the act say so or not? In our opinion the act says no such thing; and we cannot extend the provisions of the statute from a desire to prevent mischief in *consimili casu*. The preamble of the 9 Geo. 4, c. 14, recites that 'questions have arisen as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking the case out of the operation of the statute of limitations;' and the statute then goes on to legislate so as to guard against such questions afterwards arising. Before this statute passed, according to the construction of the 21 Jac. 1, c. 16, three modes were in practice to take a case out of the operation of that statute: — first, an acknowledgment by words only; secondly, a promise by words only; and thirdly, part payment of principal or interest. Let us then see whether the 9 Geo. 4, c. 14, does not confine itself to the two first, leaving the third precisely as it was before that statute passed. The words are, 'that in actions of debt, &c., no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract,' to take the case out of the statute, 'unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby.' Does that lessen the effect of the proof of payment of principal or interest? It does not; but is confined to acknowledgments or promises by words only; and part payment of principal or interest is not an acknowledgment by words, but by conduct. If the statute had stopped there, it would not have met the case of part payment; but to guard against all danger of such a construction being put upon it, there is a proviso in express terms, 'that nothing herein contained shall alter, or take away, or lessen the effect of any payment of principal or interest,' &c. Does not that leave the effect and proof of payment exactly as it was before the statute passed? With deference to the Court of Exchequer, I think it does. That construction of the statute seems so plain, that it cannot be strengthened by further observation. If we say, as we feel bound to do, that Willis *v.* Newham was improperly decided, we must return to the true construction of the statute, and hold that the evidence rejected ought to have been submitted to the jury. It would indeed be strange if Lord *Tenterden* had introduced, or the legislature had passed, an act to exclude evidence such as this, so likely to occur in the common course of business, and which is not open to fabrication, like a mere promise or acknowledgment by words, and, being *litera scripta*, cannot deceive. It is said that the effect of our decision will be to let in verbal evidence of payment; but the legislature must have thought that more mischief would arise from excluding than admitting it;

being sufficient. (*i*) We are not aware that this question has arisen in this country.

SECTION IV.

OF NEW PROMISES AND PART PAYMENTS BY ONE OF SEVERAL JOINT DEBTORS.

There has been some conflict, and some change in the law, as to the effect of the acknowledgment, part-payment, or new promise, of one of two or more joint debtors. And it is obvious that this must depend mainly upon the question whether the statute is viewed as one of repose, or one of presumption. If the latter is the true construction of the statute, as there is no reason why one of two joint debtors, as for example, one of two who were partners in a firm that has been dissolved, should not know perfectly well whether the debt exists or not; and as there is a community of interest between him and the other joint debtors, and it may be supposed he would make no acknowledgment adverse to his own interest, if it were not true, it would follow that the acknowledgment of one that it does exist, ought to bind all. But if the statute gives its protection on the ground that the debt is *either* paid, *or*, if unpaid, shall not, and ought not, to be demanded, it is obvious that the acknowledgment by one debtor of the non-payment of the debt is not enough. He may bind himself by his acknowledgment or promise, if he choose to do so, but cannot bind the other party, unless he has authority to do so. And this we take to be the true test and measure of the effect of an acknowledgment by one of many joint debtors. If he that makes the acknowledgment had full authority to bind the others by an original promise, growing out of an entirely new transaction, as one partner in an existing firm has to bind the others, then the acknowledgment, if otherwise sufficient, may bind all, as the new promise of all; but not where this authority is wanting.

otherwise they would have provided for this case, as well as that of a mere promise or acknowledgment by words only. For these reasons we are of opinion that a *venire de novo* ought to be awarded."

(*i*) Hyde *v.* Johnson, 3 Scott, 289.

We cannot, however, assert that the view above presented is fully sustained by authority, although we think it not only deducible from the reason of the law, but sustained by modern adjudication, so far, at least, as to show that the tendency of authority is in this direction. (*j*) Nevertheless,

(*j*) It was decided in Whitcomb *v.* Whiting, 3 Doug. 652, that an acknowledgment, new promise, or part payment, by one of several joint debtors, would take the case out of the statute of limitations as to all. That was an action on a joint and several promissory note executed by the defendant and three others. The plaintiff having proved payment, by one of the other three, of interest on the note and part of the principal, within six years, it was *held* that this was sufficient to take the case out of the statute as to the defendant. And Lord *Mansfield* said, "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." And *Willes*, J., said, "The defendant has had the advantage of the partial payment, and therefore, must be bound by it." It would seem that the court proceeded partly upon the then prevalent view that the statutory bar was founded on a presumption of payment, and partly upon the ground that one joint debtor, in making a new promise, or acknowledgment, or part payment, acts in his own behalf, and also as agent for the rest. The first ground, as we have already seen, no longer exists. And as to the second, it would be difficult to maintain upon principle that any such agency exists. This decision, however, though at times doubted (see Brandran *v.* Wharton, 1 B. & Ald. 463; Atkins *v.* Tredgold, 2 B. & Cr. 23,) has maintained its ground in England, and is now regarded there as sound law. See Perham *v.* Raynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & Cr. 36; Pease *v.* Hirst, 10 id. 122; Wyatt *v.* Hodson, 8 Bing. 309; Manderston *v.* Robertson, 4 M. & Ryl. 440; Channell *v.* Ditchburn, 5 M. & W. 494. In this last case it was held that payment of interest, by one of the makers of a joint and several promissory note, though made more than six years after it become due, is sufficient to take the case out of the statute of limitations, as against the other maker. And *Parke*, B., said, "The question in this case was, whether payment of interest by one of two makers of a promissory note, made after the lapse of six years from the time when the note became due, took the case out of the statute of limitations with regard to the other co-maker. Mr. Platt relied upon the case of Atkins *v.* Tredgold, and Slater *v.* Lawson, as making a distinction, and throwing a doubt upon the old case of Whitcomb *v.* Whiting, which decided that one of two joint makers of a promissory note might, by acknowledgment or part payment, take the case out of the statute, as against the other. After those two cases, undoubtedly some degree of doubt might fairly exist as to the propriety of the decision in Whitcomb *v.* Whiting; and it does seem a strange thing to say, that where a person has entered into a joint and several promissory note with another person, he thereby makes that other his agent, with authority, by acknowledgment or payment of interest, to enter into a new contract for him. But since the decisions in Atkins *v.* Tredgold and Slater *v.* Lawson, the Court of King's Bench have twice decided that payment by one of two joint makers of a promissory note, is sufficient to take the case out of the statute, as against the other. The first of these cases was that of Burleigh *v.* Stott, where the defendant was sued as the joint and several maker of a promissory note; and there the court held that payment of interest by the other joint maker was enough to take the case out of the statute, as against the defendant; and that it was to be considered as a promise by both, so as to make both liable. And since the decision in that case, the Court of King's Bench have come to the same conclusion, in the case of Manderston *v.* Roberston, which was argued on the 22d of May, 1829. I have discovered my paper book in that case, which, it appears, was argued by Mr. Platt himself; and the court decided there, that an account stated by one of the makers of a joint note, and part payment of the account, took the

our notes will show, that in some cases, a part-payment has

case out of the statute as to the other; thus confirming the authority of Burleigh *v.* Stott. Then Mr. Platt relies upon the distinction in this case, that the payment was made after the statute had run, and which was pointed out by Mr. Justice *Bayley* as one of the grounds on which he distinguished the case of Atkins *v.* Tredgold, from Whitcomb *v.* Whiting; that there the statute had attached, and that its operation could not be affected by any act of future payment. But I find that in Manderston *v.* Robertson, the note was dated the 9th of July, 1817, and an account was furnished by one of the joint makers, on the 1st of June, 1825, to the payee, taking credit to himself for payments of interest after the six years had elapsed, but not before; and it was held that this was sufficient to take the case out of the statute, as against the other maker. There the payment was after the six years had elapsed, and yet it was held sufficient. The result is, that we must consider the case of Whitcomb *v.* Whiting as good law." Whitcomb *v.* Whiting has been followed also substantially in Massachusetts. Hunt *v.* Bridgham, 2 Pick. 581; White *v.* Hale, 3 id. 291; Frye *v.* Barker, 4 id. 382; Sigourney *v.* Drury, 14 id. 387. And in Maine. Getchell *v.* Heald, 7 Greenl. 26; Greenleaf *v.* Quincy, 3 Fairf. 11; Pike *v.* Warren, 15 Maine, 390; Dinsmore *v.* Dinsmore, 21 id. 433; Shepley *v.* Waterhouse, 22 id. 497. But see *infra*, n. (*q.*) And in Vermont. Joslyn *v.* Smith, 13 Verm. 353; Wheelock *v.* Doolittle, 18 id. 440. And in Connecticut. Bound *v.* Lathrop, 4 Conn. 326; Coit *v.* Tracy, 8 id. 268; Austin *v.* Bostwick, 9 id. 496; Clark *v.* Sigourney, 17 id. 511. And perhaps in some other States. See the recent cases of Zent *v.* Heart. 8 Penn. St. 337; Goudy *v.* Gillam, 6 Rich. 28; Bowdre *v.* Hampton, id. 208; Tillinghast *v.* Nourse, 14 Geo. 641. But in the Supreme Court of the United States, in the case of Bell *v.* Morrison, 1 Pet. 351, the authority of Whitcomb *v.* Whiting was repudiated. It is true that the new promise in that case was not made until the debt was barred by the statute; but there is much reason to believe that the decision of the court would have been the same, if the promise had been made before the debt was barred. *Story*, J., in delivering the opinion of the court, after quoting the language of Lord *Mansfield*, that "payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due;" says, "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge, has necessarily, also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists by analogy to charge the whole. Now, this very position constitutes the matter in controversy. It is true, that a payment by one does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord *Mansfield* be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made." And the Court of Appeals in New-York, in two recent cases, have

barred the statute, and revived a remedy against others who

established the law in that State, in entire accordance with the view stated in the text. The first of these cases is Van Keuren *v.* Parmelee, 2 Comst. 523. It was there held that, after the dissolution of a partnership, an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm which is barred by the statute of limitations. The decision, therefore, went no further than that in Bell *v.* Morrison, and consequently did not cover the case of a new promise or acknowledgment made before the debt is barred, nor determine whether there is any distinction in this respect between a new promise or acknowledgment and a part payment. After this case was decided, there was a difference of opinion in the Supreme Court, upon the two questions last noticed. See Bogert *v.* Vermilya, 10 Barb. 32; Dunham *v.* Dodge, id. 566; Reid *v.* McNaughton, 15 id. 168. But they were both set at rest by the Court of Appeals in Shoemaker *v.* Benedict, 1 Kernan, 176. It was there *held* that payments made by one of the joint and several makers of a promissory note, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defence of the statute as to the other. And *Allen*, J., after examining the case of Van Keuren *v.* Parmelee, said, "Do the points in which this case differs from that decided in the Court of Appeals, take it without the principles decided, and without the statute of limitations? I think not. First: One point of difference is, that in this case partial payments, and not a promise or naked acknowledgment of the existence of the debt, are relied upon to take the case out of the statute. But partial payments are only available as facts from which an admission of the existence of the entire debt and a present liability to pay may be inferred. As a fact by itself, a payment only proves the existence of the debt, to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money as interest, it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is, that it is a deliberative act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is nevertheless only reliable as evidence of *a promise*, or from which a promise may be implied. Any other evidence which establishes such promise would be equally efficacious, and most assuredly a deliberate written acknowledgment of the existence of a debt and promise to pay, is of as high a character as evidence of a partial payment to defeat the statute of limitations. In either case the question is as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the debt is renewed. The question still recurs, who is authorized to make such promise? If one joint debtor could bind his co-debtors to a new contract, by implication, as by a payment of a part of a debt for which they were jointly liable, he could do it directly, by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly which cannot be done directly. If one debtor could bind his co-debtors by an unconditional promise, he could by a conditional promise, and a man might find himself a party to a contract to the condition of which he would be a stranger. Second: Another fact relied upon to distinguish this case from Van Keuren *v.* Parmelee is, that the payments were made before the statute of limitations had attached to the debt, and while the liability of all confessedly existed. In some cases in Massachussetts, this, as well as the fact that the revival or continuance of the debt was effected by payment from which a promise was implied rather than by express promises, were commented upon by the court as important points. But I do not understand that the cases were decided upon the ground that these circumstances really introduced a new element or brought the cases within a different principle. The decisions, in truth, were based upon the authority of the decisions of the English courts, and prior decisions in the courts of that State. That a promise made while the statute of limitations is running, is to be construed and acted upon in the same manner as if made after the statute has attached, is decided, in Dean *v.* Hewit, 5

were only sureties. (*k*) And this even where the parties were bound severally, as well as jointly, to pay the debt, and the action is brought only against him who did not make the payment. (*l*) And so where there were several securities for a debt, on some of which the debtor was liable alone, and on others jointly, a payment by him "on account," without specification or appropriation, was held to revive them all. (*m*) And such payment, by a joint debtor, has been held to revive the debt against the others, although the debtor made it in fraud and in expectation of his bankruptcy. (*n*)

Wend. 257, and Tompkins *v.* Brown, 1 Denio, 247. If the promise is conditional, the condition must be performed before the liability attaches so as to authorize an action. It does not, as a recognition of the existence of the debt, revive it absolutely from the time of the conditional promise. And in principle, I see not why a promise made before the statute has attached to a debt, should be obligatory when made by one of several joint debtors, when it would not be obligatory if made after the action was barred. The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required to make the promise before as after the six years have elapsed. Can it be said that one of several debtors can, on the last day of the sixth year, by a payment, small or large, or by a new promise, either express or implied, so affect the rights of his co-debtors as to continue their liability for another space of six years, without their knowledge or assent, or any authority from them, save that to be implied from the fact that they are at the time jointly liable upon the same contract, and yet that, on the very next day, without any act of the parties, such authority ceases to exist? If so, I am unable to discover upon what principle. And may the debt be thus revived, from six years to six years, through all time, or if not, what limit is put to the authority? If any agency is created, it continues until revoked. The decision of Van Keuren *v.* Parmelee, is upon the ground that no agency ever existed, not that an agency once existing has been revoked." The law is the same in New Hampshire. Exeter Bank *v.* Sullivan, 6 N. H. 124; Kelley *v.* Sanborn, 9 id. 46; Whipple *v.* Stevens, 2 Fost. 219. And in Tennessee. Belote *v.* Wynne, 7 Yerg. 534; Muse *v.* Donelson, 2 Humph. 166.

(*k*) Burleigh *v.* Stott, 8 B. & Cr. 36; Wyatt *v.* Hodson, 8 Bing. 309; Sigourney *v.* Drury, 14 Pick. 387.

(*l*) Whitcomb *v.* Whiting, 2 Doug. 652; Burleigh *v.* Stott, 8 B. & Cr. 36; Channell *v.* Ditchburn, 5 M. & W. 494.

(*m*) Dowling *v.* Ford, 11 M. & W. 329. In this case, one Nodin having applied to the plaintiff for a loan of 300*l.* on mortgage, the plaintiff, doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for 50*l.*, from Nodin and the defendant, payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by Nodin to pay the sum of 300*l.* and interest at 5 per cent. Several half-yearly payments of 7*l.* 10*s.* each, for interest, having been made by Nodin:—*Held*, in an action against the defendant upon the note, that such payments by Nodin kept all the securities alive, and prevented the operation of the statute of limitations as to the note.

(*n*) Goddard *v.* Ingram, 3 Q. B. 839. In this case, the debt was originally contracted with J., W., and S.; and S. more than six years afterwards, and within six years of the action being brought, made a payment in respect of it to the plaintiff. S. became bankrupt shortly after; and the jury found that he made the payment in fraud of J. and W., and in expectation of immediate bankruptcy. *Held*, nevertheless, that the payment barred the operation of the statute.

But in some instances, where the acknowledgment of one joint debtor is held to be *admissible* evidence of the promise of the others, the question is still reserved, whether it be sufficient evidence. As where one made an acknowledgment of a barred debt, due from him and another, under circumstances which showed that the acknowledgment was made for the sake of a personal benefit to himself, the evidence was admitted, but the jury were told that it was insufficient. (*o*) As to partners after dissolution, there is in this country much conflict; but, as we have already stated, we think the prevailing authorities are against the power of one, to bind others who were partners with him, by his acknowledgment of a barred partnership debt. (*p*)

This whole question, so far as regards the effect of a new promise or acknowledgment, by one of several joint debtors, has been set at rest in England by Lord *Tenterden's* Act, which declares, in substance, that no joint contractor shall lose the benefit of the statute, so as to be chargeable by reason only of any written acknowledgment or promise, made and signed by any co-contractor. (*q*) But in order to preserve unimpaired the remedy against the joint debtor who makes the promise or acknowledgment, the act provides that in actions to be commenced against two or more joint contractors, if it shall appear that the plaintiff, though barred by the statute as to one or more of such joint contractors, is entitled to recover against another, or others of them, by virtue of a new acknowledgment or promise, "judgment may be given, and costs allowed, for the plaintiff, as to such

(*o*) Coit *v.* Tracy, 8 Conn. 268. In this case, there was a joint indebtedness, by the defendant and one Coit, to the plaintiff, growing out of an agency conducted by the defendant and Coit jointly; and more than twenty years after such agency was ended, Coit made an acknowledgment of the debt, and then, at his own expense, and with a view to obtain an advantage to himself, by a recovery against the defendant, procured a suit to be brought, in the name of the plaintiff, against the defendant and himself; and it was *held*, that the acknowledgment of Coit, under such circumstances, was not sufficient to remove the bar of the statute of limitations, set up by the defendant.

(*p*) Bell *v.* Morrison, 1 Pet. 351; Van Keuren *v.* Parmelee, 2 Comst. 523. And see other cases cited *supra*, n. (*i*).

(*q*) There is a similar statutory provision in Massachusetts. See Mass. Rev. Sts. c. 120, § 18; Peirce *v.* Tobey, 5 Met. 168; Balcom *v.* Richards, 6 Cush. 360. And in Maine: See Maine Rev. Sts. c. 146, § 24; Quimby *v.* Putnam, 28 Maine, 419. And perhaps in some other States.

defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Formerly, the acknowledgment might be made to any one, as it had the full force of an admission of a fact. (*r*) Thus, if A. said to B., "I cannot pay you, for I owe C., and must pay him first," this, in an action brought by C. against A., to which the statute was pleaded, supported a replication that the cause of action accrued within six years. (*s*) But such doctrine would not be generally maintained now; (*t*) and it has been supposed that Lord *Tenterden's* Act, by implication, required that the acknowledgment should be *to* the creditor himself. (*u*) But this can not be the legitimate effect of the statute, if, as has been said, and would seem to be deducible from the words of the statute, its purpose is merely to substitute "the certain evidence of a writing, signed by the party chargeable, for the insecure and precarious testimony to be derived from the memory of witnesses." (*v*) For then, a writing so signed, should have the whole force of an acknowledgment proved by witnesses before the statute. Perhaps it might be admitted, from the peculiar nature of negotiable paper, that an acknowledgment by the maker to the payee, would remove the bar of the statute, in favor of a subsequent party to the note. This, however, is not quite certain on the authorities. (*w*) There seems to be no reason why a part-payment or acknowledgment to an agent, should not relieve a debt from the statute

(*r*) Mountstephen *v.* Brooke, 3 B. & Ald. 141; Peters *v.* Brown, 4 Esp. 46; Halliday *v.* Ward, 3 Campb. 32; Clark *v.* Hougham, 2 B. & Cr. 149; Soulden *v.* Van Rensselaer, 9 Wend. 293; Whitney *v.* Bigelow, 4 Pick. 110; St. John *v.* Garrow, 4 Port, 223; Oliver *v.* Gray, 1 H. & Gill, 204; Watkins *v.* Stevens, 4 Barb. 168; Carshore *v.* Huyck, 6 id. 583; Bloodgood *v.* Bruen, 4 Sandf. 427.

(*s*) Peters *v.* Brown, 4 Esp. 46.

(*t*) It is now clearly established law, in Pennsylvania, that a new promise or acknowledgment, to take a case out of the statute of limitations, must be made to the creditor or his authorized agent. See Farmers & Mechanics' Bank *v.* Wilson, 10 Watts, 261; Morgan *v.* Walton, 4 Penn. St. 323; Christy *v.* Flemington, 10 id. 129; Kyle *v.* Wells, 17 id. 286; Gillingham *v.* Gillingham, id. 302. But see the recent New York cases, cited in the preceding note, which show that the old rule is still adhered to in that State.

(*u*) Greenfell *v.* Girdlestone, 2 Y. & Col. 662.

(*v*) Per *Tindal*, C. J., in Haydon *v.* Williams, 7 Bing. 166.

(*w*) See Gale *v.* Capern, 1 Ad. & El. 102; Cripps *v.* Davis, 12 M. & W. 159; Bird *v.* Adams, 7 Geo. 505; Dean *v.* Hewit, 5 Wend. 257; Little *v.* Blunt, 9 Pick. 488; Howe *v.* Thompson, 2 Fairf. 152.

as to his principal; (*x*) or that one to an administrator should not defeat the statute as to his claim in behalf of the intestate's estate. (*y*)

SECTION V.

OF ACCOUNTS BETWEEN MERCHANTS.

The statute of James applies to "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants." And similar language, or a similar provision, is frequently found in the statute of limitations of this country.

When an action is brought to which the statute of limitations is pleaded in bar, and the question arises whether this exception can be replied, so as to remove the bar, it is necessary to inquire, 1st, whether the transaction upon which the action is founded, constitutes an "account" within the meaning of the exception; and, 2d, whether the account is one which concerns "the trade of merchandise, between merchant and merchant, their factors or servants," within the meaning of the exception. And unless both of these questions can be answered in the affirmative, the statute will apply. In regard to the first of these questions, it is settled in England, by recent cases, that a transaction will not constitute an "account" within the meaning of this exception, unless it is such that it would sustain an action of account, or an action on the case for not accounting. (*z*) This doctrine appears to

(*x*) Megginson *v.* Harper, 2 Cr. & M. 322; Hill *v.* Kendall, 25 Verm. 528.

(*y*) Baxter *v.* Penniman, 8 Mass. 133; Jones *v.* Moore, 5 Binn. 573.

(*z*) Inglis *v.* Haigh, 8 M. & W. 769. This was an action of indebitatus assumpsit, in which the plaintiff declared for work and labor, money lent, money paid, and for interest. The defendant pleaded the statute of limitations. The plaintiff replied that he and the defendant were both merchants, and that the cause of action stated in the declaration arose in a course of dealing, carried on between the plaintiff and defendant, as merchant and merchant, and consisted of items in an open and unsettled account between them, as such merchants, and which said account contained various items in favor of the defendant, and the balance due on which he, the plaintiff, sought to recover in the present action. The question was, whether this replication was a sufficient answer to the plea. And the court held that it was not. *Parke*, B., in deliver-

rest upon very satisfactory grounds, and we think it will be adopted by the courts in this country. As to the second

ing the judgment of the court, said, "The plea of the statute of limitations is a complete bar, unless the plaintiff, by his replication, can take the case out of its operation. He attempts to do so by bringing it within the exception in the statute, as to merchants' accounts. But we think that exception does not apply to an action of indebitatus assumpsit, for the several items of which the account is composed, or for the general balance, but only to a proper action of account, or perhaps also an action on the case for not accounting. Although there is no reported case expressly governing the present, yet there are many coming very near it, and in which the *dicta* of very eminent judges fully warrant the view we take of the subject." [His Lordship then proceeded to examine the cases.] "In none of these did the facts necessarily call for a decision, whether the exception did or did not at all apply to actions of assumpsit. Still the dicta of the judges in those cases are entitled to great weight, unopposed as they are by any conflicting authority whatever. But independently of authority, we are of opinion that the reasonable construction of the statute requires such a restriction as the dicta of the judges, in the cases we have referred to, clearly sanction. The words are, 'all actions of account, and upon the case, other than such *accounts* as concern the trade of merchandise, between merchant and merchant, their factors or servants.' Now, as was said by *Scroggs*, J., in the case of Farrington *v.* Lee, 1 Mod. 269, 2 id. 311, if the legislature had meant to include in the exception other actions than actions of account, the language would probably have been 'other than such *actions* as concern the trade of merchandise,' and not 'other than such accounts.' Indeed, it is difficult to say that an action of indebitatus assumpsit, for goods sold and delivered, or for money had and received, can, under any circumstances, be described as an action having any reference to *accounts*; it would have been still more difficult to say so at the time when the statute of limitations was passed. Where a merchant plaintiff brings an action for goods sold and delivered, money paid, or any of the other items which may constitute his demand against the merchant defendant, with whom he has had mutual dealings, he is rather repudiating than enforcing *accounts*. Indeed, by the comparatively modern statutes of set-off, the defendant may now have the benefit of his counter demands; but that was not the case at the date of the statute of limitations; and we must construe the statute now, as it ought to have been construed immediately after it became law. At that time there was no proceeding at law by which mutual demands could be set against each other, except by action of account, and consequently there was no other action in any manner connected with accounts, properly so called. It does not at all vary the case, that the plaintiff only seeks to recover what he calls the *balance* due on the account. If that balance had been stated and agreed to, then all the authorities show that it is altogether out of the exception. If it has not been stated and agreed to, then it is only what the plaintiff chooses to call a balance, the accuracy of which the defendant had, at the time of passing the statute of limitations, no means of disputing, in an action of assumpsit. Our view of the case is much assisted by considering that the exception clearly would not apply to an action of *debt*, brought for the very same demand; and it is difficult to believe that the legislature could have intended to preserve the right in one form of action, but to bar it in another." About a year afterwards, the case of Cottam *v.* Partridge, 4 Scott, N. R. 819, was decided in the Common Pleas. That was an action of assumpsit, for goods sold and delivered. It appeared that the plaintiffs were iron-founders, and wholesale and retail manufacturing smiths, and agricultural implement makers. The defendant carried on the business of a retail ironmonger. The action was brought to recover the balance of an account, for goods sold and delivered by the plaintiffs to the defendant, between the month of June, 1830, and June, 1834. *Held*, that the case was not within the exception in the statute of limitations, as to merchants' accounts. And *Tindal*, C. J., said, "In the late case of Inglis *v.* Haigh, 8 M. & W. 769, the Court of

question, there seems to be no test by which it can be determined, other than that furnished by the language of the statute. In applying this language, however, to the facts of particular cases, much aid may be derived from the cases already decided. (*a*) An opinion seems formerly to have

Exchequer seem to have decided that the exception, as to merchants' accounts, in the statute of limitations, applies only to *an action of account*, or perhaps also to *an action on the case for not accounting*, but not to an action of indebitatus assumpsit. Without going quite so far as that (though I by no means intend to impeach the propriety of that decision), I am of opinion that the exception will not apply, except where an action of account is maintainable; and the ground upon which I rest the determination of the present case, is, that the circumstances are not such for which an action of account would lie." The earlier cases will be found fully collected, in a learned note to Webber *v.* Tivill, 2 Saund. 121, by Sergeant *Williams*. And see Spring *v.* Gray, 5 Mason, 505, 6 Pet. 151. In this case, *Marshall*, C. J., after quoting the language of the statute, says, " From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account." See also Toland *v.* Sprague, 12 Pet. 300; Didier *v.* Davison, 2 Barb. Ch. 477.

(*a*) Where the joint owners of plantations in Java, which they worked in copartnership, kept an account with certain merchants and agents at *Bombay*, to whom they became largely indebted in respect of moneys advanced and paid for their use; it was held, that the account was not a mercantile account, within the meaning of the exception in the statute of limitations. Forbes *v.* Skelton, 8 Sim. 335. And in Spring *v.* Gray, 5 Mason, 505, 6 Pet. 151, it was *held*, that a special contract between ship-owners and a shipper of goods, to receive half profits in lieu of *freight* on the shipment for a foreign voyage, is not a case of merchants' accounts, within the exception in the statute of limitations. And *Marshall*, C. J., said, " The account must be one 'which concerns the trade of merchandise.' The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them; but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business, as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant." In Watson *v.* Lyle, 4 Leigh, 236, where the plaintiff replied to a plea of the statute of limitations, that the cause of action consisted of accounts, which concerned the trade of merchandise, between merchant and merchant, and no evidence was adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the plaintiff, in which account the debits to the alleged debtor consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him; it was *held*, that the replication was not supported by the evidence, and the demand therefore was barred by the statute. Again, in Farmers & Mechanics' Bank *v.* Planters' Bank, 10 Gill. & Johns. 422, it was *held*, that the exception did not apply to transactions between banking institutions. And see farther, Dutton *v.* Hutchinson, 1 Jur. 722; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Landsdale *v.* Brashear, 3 Monr. 330 Patterson *v.* Brown, 6 id. 10; Smith *v.*

been entertained that none were merchants, within the meaning of this exception, save those who traded beyond sea. (*b*) But that clearly would not be held now. So, also, an opinion has prevailed, to some extent, that the exception does not extend to accounts between merchants, as partners; (*c*) but we doubt whether there is good reason for such a restriction. (*d*) Whether common retail tradesmen come within the exception, as being merchants, is more uncertain. (*e*)

It has been much questioned whether this exception required that even where the account was between merchants, and in relation to merchandise, some item of it must be within six years. (*f*) It would seem that this construction *adds* to the statute. It requires, for admission within the exception, a new, distinct, and important element, which the statute certainly does not express, and perhaps does not indicate. We consider this question as now settled in England, in the negative; and believe that it will be so held in this country. (*g*)

Dawson, 10 B. Monr. 112; Price *v.* Upshaw, 2 Humph. 142; Slocumb *v.* Holmes, 1 How. (Miss.) 139; Fox *v.* Fisk, 6 id. 328; Marseilles *v.* Kenton, 17 Penn. St. 238; McCulloch *v.* Judd, 20 Ala. 703; Blair *v.* Drew, 6 N. H. 235; Sturt *v.* Mellish, 2 Atk. 612; Codman *v.* Rogers, 10 Pick. 118; Coalter *v.* Coalter, 1 Rob. (Virg.) 79.

(*b*) Thus, in Sherman *v.* Withers, 1 Ch. Cas. 152, which was a bill in equity for an account of fourteen years' standing, it appeared that the plaintiff was an inland merchant, and the defendant his factor. The defendant pleaded the statute of limitations. And "upon debate of the plea, the Lord Keeper conceived the exception in the statute, as to merchants' accounts, did not extend to this case, but only to merchants trading beyond sea."

(*c*) Bridges *v.* Mitchell, Barb. 217; Lansdale *v.* Brashear, 3 Monr. 330; Patterson *v.* Brown, 6 id. 10; Coalter *v.* Coalter, 1 Rob. (Virg.) 79.

(*d*) See Ogden *v.* Astor, 4 Sandf. 327.

(*e*) In Farrington *v.* Lee, 1 Mod. 268, *Atkyns*, J., said, "I think the makers of this statute had a greater regard to the persons of merchants, than the causes of action between them. And the reason was, because they are often out of the realm, and cannot always prosecute their actions in due time. I think, also, that no other sort of tradesmen but merchants are within the benefit of this exception; and that it does not extend to shop-keepers, they not being within the same mischief." And see Cottam *v.* Partridge, 4 Scott, N. R. 819, where this question was raised, but not decided.

(*f*) For cases holding the affirmative of this question, see Welford *v.* Liddel, 2 Ves. 400; Martin *v.* Heathcote, 2 Eden, 169; Barber *v.* Barber, 18 Ves. 286; Foster *v.* Hodgson, 19 id. 179; Ault *v.* Goodrich, 4 Russ. 430; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Didier *v.* Davison, 2 Barb. Ch. 477; Van Rhyn *v.* Vincent, 1 McCord's Ch. 310.

(*g*) That this question is now settled in the negative in England, see Catling *v.* Skoulding, 6 T. R. 189; Robinson *v.* Alexander, 8 Bligh, 352; Inglis *v.* Haigh, 8 M. & W. 769. See, however, Tatam *v.* Williams, 3 Hare, 347. And such also is the weight of authority in this country. See Mandeville *v.* Wilson, 5 Cranch, 15; Spring *v.* Gray, 6 Pet. 151; Bass *v.* Bass, 6 Pick. 362; Watson *v.* Lyle, 4 Leigh, 236; Coalter *v.* Coalter, 1 Rob. (Virg.) 79; Lansdale *v.* Brashear, 3 Monr. 330; Patterson *v.* Brown, 6 id. 10; Dyott *v.*

SECTION VI.

WHEN THE PERIOD OF LIMITATION BEGINS TO RUN.

The next question we propose to consider, is, from what point of time the six years are to be counted. The general answer is, from the period when the creditor could have commenced his action; because it is then only that the reason of the limitation begins to operate, whether we say with the theory that the statute is one of presumption, that so long a delay makes it probable that the debt is paid, or suppose the statute to be one of repose, and say that after so long a neglect, the creditor ought to lose his action. Thus, if a credit is given, the six years begin when the credit expires; (*h*) and if the money be payable on the happening of a certain event, the six years begin from the happening of the event, as on a marriage; (*i*) or if a bill be payable at sight, the six years begin on presentment and demand. (*j*) And this credit may be inferred, or lengthened, by inference. (*k*) As if goods are sold on six months credit, and then a bill to be given, payable at three months, the six years begin after nine months; and if the bill may be at two or four months, at the purchaser's option, this, it seems, would be construed as a credit for ten months. (*l*) It may, however, be doubted whether the true construction of such a contract should not be a credit for six months; then a bill for two or four; and if the bill is given, the statute will begin to run when the bill is due and not before; but if the bill is

Letcher, 6 J. J. Marsh. 541; Guichard *v.* Superveile, 11 Texas, 522; Ogden *v.* Astor, 4 Sandf. 329.

(*h*) Thus, in Wittersheim *v.* Lady Carlisle, 1 H. Bl. 631, it was *held*, that where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, namely, when the bill became due. And see Wheatley *v.* Williams, 1 M. & W. 533; Irving *v.* Veitch, 3 id. 90; Fryer *v.* Roe, 22 E. L. & Eq. 440.

(*i*) Shutford *v.* Borough, Godb. 437; Fenton *v.* Emblers, 1 Wm. Bl. 353.

(*j*) Wolfe *v.* Whiteman, 4 Harring. 246; Holmes *v.* Kerrison, 2 Taunt. 323.

(*k*) See Brent *v.* Cook, 12 B. Monr. 267.

(*l*) Helps *v.* Winterbottom, 2 B. & Ad. 431.

not given, this is a breach of the contract so far, and the credit ends with the six months, and the statute then begins to run. (*m*)

Where there are third parties in the transaction, the same rule prevails. As if one sells property belonging to himself and another, and this other sues him for his share, the action is barred by the statute, only if six years have run from the time when the payment was made by the buyer. (*n*) And if the seller takes a promissory note for the goods, the six years do not run for him from the sale, nor yet from the maturity of the note; but only from the actual payment, because only then could the other owner demand his share. (*o*) So if a surety pays for his principal, the statute begins to run from his first payment for his principal, as to that payment; (*p*) but as to his claim on a co-surety, for contribution, it does not begin when he begins to pay, but only when his payments first amount to more than his share. (*q*) So in a contract of indemnity; the six years begin only with the actual damnification. (*r*) As if one lends a note, on a promise of indemnity, the statute begins to run only from the time when he has to pay the note he lends. (*s*) If a demand be necessary to sustain an action, only after it is made does the statute begin. (*t*) But a note payable "on demand" is due always, and the statute begins as soon as the note is made. (*u*) So it is with a receipt for money borrowed, whereby the borrower agrees to pay "whenever called upon to do so." (*v*)

(*m*) Per *Parke*, J., in Helps *v.* Winterbottom, *supra*.

(*n*) Miller *v.* Miller, 7 Pick. 133.

(*o*) Id.

(*p*) Davies *v.* Humphreys, 6 M. & W. 153; Ponder *v.* Carter, 12 Iredell, 242; Gillespie *v.* Creswell, 12 Gill & Johns. 36; Bullock *v.* Campbell, 9 Gill, 182.

(*q*) Davies *v.* Humphreys, *supra*.

(*r*) Huntley *v.* Sanderson, 1 Cr. & M. 467; Collinge *v.* Heywood, 9 Ad. & El. 633: Ponder *v.* Carter, 12 Iredell, 242; Sims *v.* Goudelock, 6 Rich. 100; Gillespie *v.* Creswell, 12 Gill & Johns. 36.

(*s*) Reynolds *v.* Doyle, 2 Scott, N. R. 45.

(*t*) For the cases in which a demand is necessary, see Topham *v.* Braddick, 1 Taunt. 572; Clark *v.* Moody, 17 Mass. 145; Coffin *v.* Coffin, 7 Greenl. 298; Little *v.* Blunt, 9 Pick. 488; Stafford *v.* Richardson, 15 Wend. 302; Lillie *v.* Hoyt, 5 Hill, 395; Hickok *v.* Hickok, 13 Barb. 632; Lyle *v.* Murray, 4 Sandf. 590; Mitchell *v.* McLemore, 9 Texas, 151; McDonnell *v.* Branch Bank, 20 Ala. 313; Taylor *v.* Spears, 3 Eng. (Ark.) 429; Denton *v.* Embury, 5 id. 228.

(*u*) Little *v.* Blunt, 9 Pick. 488; Wenman *v.* The Mohawk Ins. Co., 13 Wend. 267; Hill *v.* Henry, 17 Ohio, 9; Norton *v.* Ellam, 2 M. & W. 461.

(*v*) See Waters *v.* The Earl of Thanet, 2 Q. B. 757.

The statute begins to run whenever the creditor or plaintiff *could* bring his action, and not when he knew he could; as if one promises to pay when able, as soon as he is able the statute runs, although the creditor did not know it. (*w*) And if the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury result from the breach until afterwards. (*x*) As if one delivers goods which are not what he undertakes to sell, and the purchaser re-sells under his mistake, and is obliged to pay damages, he has a claim against the first seller, but must bring his action to enforce it within six years from the first sale. (*y*) So if one is guilty of gross negligence, whereby injury occurs, six years, running from the time of his neglect, will bar the action, although the injury has occurred within the six. (*z*)

The holder of a foreign bill acquires a right of action, as against the drawer, immediately on non-acceptance, protest, and notice; and the statute then begins to run against him; and, therefore, if he afterwards pays the bill when due, he has not six years from that payment in which he may bring his action. (*a*) It has been said, *obiter*, in New York, that a second endorser who sues a prior endorser for money paid on a note, but who has not paid the note and brought his action upon it, cannot maintain his action, if the statute has run in favor of the defendant, and against the holder of the note. (*b*)

(*w*) Waters *v.* The Earl of Thanet, 2 Q. B. 757. And see Battley *v.* Faulkner, 3 B. & Ald. 288; Short *v.* McCarthy, id. 626; Brown *v.* Howard, 2 Br. & Bing. 73; Granger *v.* George, 5 B. & Cr. 149; Argall *v.* Bryant, 1 Sandf. 98; Troup *v.* Smith, 20 Johns. 33; Howell *v.* Young, 5 B. & Cr. 259; Wilcox *v.* Plummer, 4 Pet. 172; Kerns *v.* Schoonmaker, 4 Ohio, 331; Denton *v.* Embury, 5 Eng. (Ark.) 228; The Governor *v.* Gordon, 15 Ala. 72.

(*x*) Argall *v.* Bryant, 1 Sandf. 98; Smith *v.* Fox, 6 Hare, 386. And see cases cited in preceding note.

(*y*) Thus, where A., under a contract to deliver spring-wheat, had delivered to B. winter-wheat, and B., having again sold the same as spring-wheat, had in consequence been compelled, after a suit in *Scotland*, which lasted many years, to pay damages to the vendee, and afterwards brought an action of assumpsit against A. for his breach of contract, alleging as special damage, the damages so recovered, it was *held*, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of the contract having occurred more than six years before that period, A. might properly plead *actio non accrevit infra sex annos*. Battley *v.* Faulkner, 3 B. & Ald. 289.

(*z*) Sinclair *v.* The Bank of So. Car. 2 Strobh. 344. And see cases cited *supra*, n. (*u*).

(*a*) Whitehead *v.* Walker, 9 M. & W. 506.

(*b*) Wright *v.* Butler, 6 Cow. 284. And see Barker *v.* Cassidy, 16 Barb. 177.

If money be payable by instalments, the statute begins to run as to each instalment from the time when it becomes due; but if there be an agreement that upon default as to any one, all then unpaid shall become payable, the statute begins to run as to all, upon any default. (*c*)

If the demand arise from the imperfect execution of a contract to do certain work, in a certain way, and within a certain time, it is said that the six years begin to run from the time when the work was to have been completed, and not from the time when the plaintiff had received actual damage from the imperfect execution of the work. (*d*)

It would seem, both from English and American authority, that the statute does not begin to run against the claim of an attorney, for professional services, until he no longer acts in that matter as attorney; (*e*) but he may terminate his professional relation at his own pleasure, (if he thereby does no wrong to his client) and demand payment of his bill; and the statute then begins to run. (*f*) So it would undoubtedly be, if the services were in any way brought to an end, although no demand were made; because (except so far as the English rule, requiring a delivery of the signed bill one month before suit, might prevent it) he could bring an action for his services at once.

SECTION VII.

OF THE STATUTE EXCEPTIONS AND DISABILITIES.

The statute of James provides, that if the plaintiff, at the time when the cause of action accrues, is within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, he may bring his action at any time within six years after the disability ceases or is removed.

(*c*) Hemp *v.* Garland, 4 Q. B. 519.

(*d*) Rankin *v.* Woodworth, 3 Penn. 48.

(*e*) Harris *v.* Osbourn, 2 Cr. & M. 629; Nicholls *v.* Wilson, 11 M. & W. 106; Whitehead *v.* Lord, 11 E. L. & Eq. 587; Rothery *v.* Munnings, 1 B. & Ad. 15; Phillips *v.* Broadley, 9 Q. B. 744; Foster *v.* Jack, 4 Watts, 334; Jones *v.* Lewis, 11 Texas, 359.

(*f*) Vansandau *v.* Browne, 9 Bing. 402.

If, therefore, either of these disabilities exists, when the cause of action arises, then, so long as it exists, the statute does not run; but as soon as the disability is removed, the statute begins to run.

In general, if the statute begins to run, its operation cannot afterwards be arrested. (*g*) Thus, if the disability should not exist when the cause of action arose, but should begin one month afterwards, and remain, as if the creditor should go abroad and not return, the statute runs in the same way as if the disability never existed. So if it exists when the cause of action begins, and is afterwards removed, although temporarily, the statute begins to run as soon as the disability is removed, and then continues. And it has been held, not only that if the creditor returns to his home for a short time, and then goes abroad again, and remains there, the statute begins to operate; but if there be joint creditors, who were abroad when the cause of action accrued, and one of them returned home, the six years begin as to all from such return. (*h*)

If several disabilities co-exist when the right of action accrues, the statute does not begin to run until all are removed. (*i*) But if there exists but one disability at the time when the cause of action accrues, other disabilities, arising afterwards, cannot be tacked to the first, so as to extend the time of limitation. (*j*)

But it is obvious that an action cannot be brought if the defendant cannot be reached, any more than if the plaintiff cannot act. And, therefore, the statute of the fourth of Anne, ch. 16, s. 19, provides that if any person against whom there shall be a cause of action, shall, at the time when such cause

(*g*) Smith *v.* Hill, 1 Wils. 134; Gray *v.* Mendez, Strange, 556; Ruff *v.* Bull, 7 H. & Johns. 14; Young *v.* Mackall, 4 Maryland, 362; Coventry *v.* Atherton, 9 Ohio, 34; Pendergrast *v.* Foley, 8 Geo. 1.

(*h*) Perry *v.* Jackson, 4 T. R. 516; Marsteller *v.* M'Clean, 7 Cranch, 156; Henry *v.* Means, 2 Hill, (S. C.) 328; Riggs *v.* Dooley, 7 B. Monr. 236; Wells *v.* Ragland, 1 Swan, 501. But see, *contra*, Gourdine *v.* Graham, 1 Brevard, 329.

(*i*) Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Jackson *v.* Robinson, 5 Cow. 74; Butler *v.* Howe, 13 Maine, 397; Dugan *v.* Gittings, 3 Gill, 138; Scott *v.* Haddock, 11 Geo. 258.

(*j*) Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Jackson *v.* Wheat, 18 Johns. 40; Eager *v.* The Commonwealth, 4 Mass. 182; Dease *v.* Jones, 23 Mississippi, 133; Doe *d.* Caldwell *v.* Thorp, 8 Ala. 253; Mercer *v.* Selden, 1 How. 37; Bradstreet *v.* Clarke, 12 Wend. 602; Scott *v.* Haddock, 11 Geo. 258.

of action accrues, be beyond the seas, then the action may be brought at any time within six years after his return. This statute also has been substantially re-enacted here. In England it seems to have been held that if the debtor returns but for a few days, and his return is wholly unknown to the creditor, the statute begins to run from the date of his return. (*k*) But it has been held here, that if the debtor come back within the jurisdiction and remain some weeks, but hide himself, so that the creditor has not actually an opportunity of suing him, this return does not satisfy the purpose of the statute, and the six years do not begin. (*l*) It has further been held here, that in order to put the statute in operation, the defendant is bound to show, either that the plaintiff knew of his return, so as to have had an opportunity to arrest him, or that his return was so public as to amount to constructive notice or knowledge, and to raise the presumption that if the plaintiff had used ordinary diligence, the defendant might have been arrested. (*m*)

(*k*) See Gregory *v.* Hurrill, 5 B. & Cr. 341; Holl *v.* Hadley, 2 Ad. & El. 758.

(*l*) White *v.* Bailey, 3 Mass. 271. So the Supreme Court of New York in Fowler *v.* Hunt, 10 Johns. 464, declared that "The coming from abroad must not be clandestine, and with an intent to defraud the creditor by setting the statute in operation and then departing. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor." So in Hysinger *v.* Baltzells, 3 Gill & Johns. 158, where the cause of action accrued in October, 1822, when the defendant was a resident of another State, and it appeared that the defendant was in *Baltimore*, where the plaintiff resided, in April, 1823, "purchased other goods from the plaintiff, and remained there for two days," it was *held*, that the statute did not begin to run, because it did not appear at what time during those two days, the defendant made his purchase; nor whether the plaintiff had an opportunity to sue out a writ against him with effect. And *Martin*, J., said, "It might be true the defendant was in *Baltimore* for two days, and that he purchased goods from the plaintiffs, yet if their knowledge of his being there arose *solely* from the purchase made, and that purchase was made *immediately* before the defendant left the city, that would not afford them an opportunity to sue out a writ with effect. If it had been stated, that the defendant was in *Baltimore* for two days, and that the plaintiffs knew he was there for *that space of time*, *laches* might be imputed to them; but this is not stated, and the court could not infer it." And see further, State Bank *v.* Seawell, 18 Ala. 616; Byrne *v.* Crowninshield, 1 Pick. 263; Howell *v.* Burnett, 11 Geo. 303; Alexander *v.* Burnett, 5 Rich. 189; Dorr *v.* Swartwout, 1 Blatch. 179; Randall *v.* Wilkins, 4 Denio, 577.

(*m*) Little *v.* Blunt, 16 Pick. 359. In Mazozon *v.* Foot, 1 Aikens, 282, *Skinner*, C. J., said, "It cannot be supposed, nor does the defendant insist, that every coming or return into the State, would set the statute in operation. He admits it must be such, as that by due diligence the creditor might cause an arrest. If the debtor should remove or return to the State publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence, or that of the creditor, this would undoubtedly bring the case, by a correct

A question has been made whether the exception in the statute, in reference to absentees, extends to foreigners, or those who have resided altogether out of the State or country, as well as to citizens who may be absent for a time. And it has been contended that the word "return" required that the exception should be confined to the latter class. But the contrary is well settled both here and in England. (*n*) And it seems that this exception to the statute of limitations applies to foreigners, even where they have an agent residing in the State where the suit is brought. (*o*) Where the debtor is a resident of the State or country at the time the cause of action accrues, and until his death, the statute of limitations commences running only from the time of granting letters of administration on his estate. (*p*)

In New England, where attachment by mesne process prevailed, it was formerly very generally provided that if the defendant had left property within the State, this clause did not operate, because the action could be begun and kept alive by attachment. And under this provision it was held that real estate was such property, and prevented the operation of this section, although under attachment for more than

construction of the statute, within its operation, though the creditor should have no knowledge of his return. So too if the debtor, having no intention to reside here, comes or returns into the State, and this is known to the creditor, and he has an opportunity to arrest the body, the case is brought within the statute. In the latter case, it is necessary the creditor should be apprised of his debtor's being within the jurisdiction of the State." And see Hill *v.* Bellows, 15 Verm. 727; Didier *v.* Davison, 2 Sandf. Ch. 61. But see, *contra*, State Bank *v.* Seawell, 18 Ala. 616.

(*n*) Thus in Ruggles *v.* Keeler, 3 Johns. 261, *Kent*, C. J., said, "Whether the defendant be a resident of this State, and only absent for a time, or whether he resides altogether out of the State, is immaterial. He is equally within the proviso. If the cause of action arose out of the State, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the *English* statutes, which also speak of the *return* from beyond seas of the party so absent. The word *return* has never been construed to confine the proviso to *Englishmen*, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad." And see, to the same effect, Strithorst *v.* Graeme, 3 Wils. 145, 2 Wm. Bl. 723; Lafonde *v.* Ruddock, 24 E. L. & E. 239; King *v.* Lane, 7 Missouri, 241; Tagart *v.* The State of Indiana, 15 id. 209; Alexander *v.* Burnet, 5 Rich. 189; Estis *v.* Rawlins, 5 How. (Miss.) 258; Hall *v.* Little, 14 Mass. 203; Dunning *v.* Chamberlin, 6 Verm. 127; Graves *v.* Weeks, 19 id. 178; Chomqua *v.* Mason, 1 Gall. 342. But see, contra, Snoddy *v.* Cage, 5 Texas, 106; Moore *v.* Hendrick, 8 id. 253.

(*o*) Wilson *v.* Appleton, 17 Mass. 180.

(*p*) Benjamin *v.* De Groot, 1 Denio, 151; Christophers *v.* Garr, 2 Seld. 61; Davis *v.* Garr, id. 124; Douglas *v.* Forrest, 4 Bing. 686.

its value. (*q*) Because the action could still be kept alive, and perhaps the first attachment might be defeated. But this clause, respecting property, is now, in some cases, omitted. (*r*) It is, however, sometimes provided, that if, after the action accrues, the defendant shall be absent from, and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. Under this clause the question has arisen whether successive absences can be accumulated, and the aggregate deducted from the time elapsed after the accruing of the cause of action; or whether the statute provides only for a single departure and return, after which it continues to run, notwithstanding any subsequent departure. And this question has been decided differently in different States. (*s*) The question has also arisen, whether this clause contemplates *temporary* absences, or only such as result from a permanent change of *residence*. And upon this question also learned courts have differed. (*t*)

It has been recently held in England, that if there be several defendants, and some of them are abroad, and some at home, the statute does not begin to run in regard to any who are at home, until all are within reach of suit. (*u*) For although, if one of several co-plaintiffs is within seas, the statute runs, because one plaintiff can use the names of the others in his action, it is otherwise as to co-defendants. The plaintiff can sue those only who are within reach; and if compelled to sue them, he may have a judgment against

(*q*) Byrne *v.* Crowninshield, 1 Pick. 263.

(*r*) See Mass. Rev. St. c. 120, § 9.

(*s*) In New York it has been *held*, that the statute provides for only a single departure and return. Cole *v.* Jessup, 2 Barb. 309; Dorr *v.* Swartwout, 1 Blatch. 179. But the contrary has since been decided in New Hampshire. Gilman *v.* Cutts, 3 Fost. 376. And see Smith *v.* The Heirs of Bond, 8 Ala. 386; Chenot *v.* Lefevre, 3 Gilm. 637.

(*t*) In the case of Gilman *v.* Cutts, *supra*, the Superior Court of New Hampshire *held*, that every absence from the State, whether temporary or otherwise, if it be such that the creditor cannot, during the time of its continuance, make legal service upon the debtor, must be reckoned. And see Vanlandingham *v.* Huston, 4 Gilm. 125. But in Wheeler *v.* Webster, 1 E. D. Smith, 1, the Court of Common Pleas for the City and County of New York, held that, in order to interrupt the running of the statute, it is not sufficient to prove that the debtor, after the cause of action accrued, from time to time departed and was repeatedly absent from the State; he must be shown to have departed from, and *resided* out of the State.

(*u*) Fannin *v.* Anderson, 7 Q. B. 811.

insolvent persons, which satisfies his claim and destroys his remedy against solvent debtors.

The expression "beyond the seas" in the English statute, is repeated in some of the American statutes; and in others, such phrases as "beyond sea," "over the sea," "out of the country," "out of the State," are used in its stead, but for an equivalent purpose. These phrases are generally construed to mean, out of the State or jurisdiction where the case is tried; (*v*) but our notes will show that there is much authority for construing any such phrase as meaning beyond the limits of the United States. (*w*)

There is some uncertainty whether it is a good defence at law against the operation of the statute, when an action is grounded upon a fraud committed more than six years before, that it was not discovered until within six years. There is no exception against fraud, in the English statute; nor is such an exception generally made in this country. And although in equity, this would remove the bar of the statute, almost as a matter of course, (*x*) there is some difficulty in giving effect to it at law. Nevertheless, the prevailing rule in this country prevents the six years from beginning to run, even at law, until the fraud is discovered by the plaintiff; (*y*) but our notes will show that there is much diversity in the decisions on this subject.

(*v*) Galusha *v.* Cobleigh, 13 N. H. 79; Field *v.* Dickenson, 3 Pike, 409; Wakefield *v.* Smart, 3 Eng. (Ark.) 488; Richardson *v.* Richardson, 6 Ohio, 125; Pancoast *v.* Addison, 1 H. & John. 350; Forbes *v.* Foot, 2 McCord, 331; Murray *v.* Baker, 3 Wheat. 541; Shelby *v.* Guy, 11 id. 361.

(*w*) Thus in Pennsylvania the term "beyond the seas" is construed to mean without the limits of the United States. Thurston *v.* Fisher, 9 S. & R. 288. Also in North Carolina. Whitlocke *v.* Walton, 2 Murphy, 23; Earle *v.* Dickson, 1 Dev. 16. And in Missouri. Marvin *v.* Bates, 13 Missouri, 217; Fackler *v.* Fackler, 14 id. 431.

(*x*) Mayne *v.* Griswold, 3 Sandf. 463; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 122; Stocks *v.* Van Leonard, 8 Geo. 511; Chaster *v.* Trevelyan, 11 Cl. & Fin. 714; Blair *v.* Bromley, 5 Hare, 542.

(*y*) Sherwood *v.* Sutton, 5 Mason, 143; Conyers *v.* Kenans, 4 Geo. 308; Persons *v.* Jones, 12 id. 371; The First Massachusetts Turnpike Corp. *v.* Field, 3 Mass. 201; Horner *v.* Fish, 1 Pick. 435; Pennock *v.* Freeman, 1 Watts, 401; Harrell *v.* Kelly, 2 McCord, 426; But see, *contra*, Troup *v.* Smith, 20 Johns. 33; Leonard *v.* Pitney, 5 Wend. 30; Allen *v.* Mills, 17 id. 202; Smith *v.* Bishop, 9 Verm. 110; Lewis *v.* Houston, 11 Texas, 642.

SECTION VIII.

THAT THE STATUTE AFFECTS THE REMEDY ONLY, AND NOT THE DEBT.

The statute only declares that "no action shall be maintained;" but not that the cause of action is made void. Hence, although the remedy by action is lost, a lien is not lost. If one holds a note against which the statute has run, and also a mortgage or pledge of real or personal property to secure it, he cannot sue the note, but he can take, or hold possession of the property, and sell it, if it be personal, with proper precautions, or have a bill in equity, to foreclose his mortgage. And if his lien, whatever it be, fails to pay the whole amount of the note, he loses the remainder, because he can have no action *upon it*, although he may have proper process founded upon the debt and the security, to establish his lien, and make it available in payment of the debt. (*z*)

(*z*) Spears *v.* Hartley, 3 Esp. 81; Quantock *v.* England, 5 Burr. 2628; Williams *v.* Jones, 13 East, 450; Chapple *v.* Durston, 1 C. & J. 1; Manor *v.* Pyne, 2 C. & P. 91. The early cases of Draper *v.* Glassop, 1 Lord Raymond, 153, and Anon. Salkeld, 278, which were decided upon the ground that the statute of limitations destroyed the debt as well as the remedy, have now no authority.

CHAPTER VI.

OF INTEREST AND USURY.

Sect. 1. — *Of Interest, and when it is recoverable.*

Originally, the word usury meant any money received for the use of other money. Whether it were more or less, such taking was thought to be unlawful, or, at least, immoral. In modern times, a moderate payment for the use of money has been held to be lawful; and to this the name of interest is given; or rather such payment of money for the use of money, whether it be more or less, is now called interest, while the word usury is now confined to the taking of more than the law allows.

Now, and for some generations, the law of England and of this country not only permits parties to bargain for a certain rate of interest, and enforces that bargain, but it makes it for them, in many cases; that is, where it is certain that money ought now to be paid, and ought to have been paid long since, the law, in general, implies conclusively that for the delay in the payment of the money, the debtor promised to pay legal interest. (*a*)

This interest is allowed on money withheld, if not on the ground of some contract, express or implied, to pay it, then as damages for default in retaining the money which belongs to another. The contract may be implied from the usage of a place, or of a trade, (*b*) or from the course of dealing between the parties, (*bb*) or from the practice of one party if that be known to the other party. (*c*)

Among the cases in which interest has been allowed for the detention of a debt, the following may be considered the most important: In an action of debt on a judgment, (*d*)

(*a*) Selleck *v.* French, 1 Conn. 32; Reid *v.* Rensselaer Glass Factory, 3 Cow. 393, 5 Id. 589; Dodge *v.* Perkins, 9 Pick. 369.

(*b*) Meech *v.* Smith, 7 Wend. 315; Koons *v.* Miller, 3 W. & S. 271.

(*bb*) Esterly *v.* Cole, 3 Comst. 502, 1 Barb. 235.

(*c*) M'Allister v. Reab, 4 Wend. 483, 8 Wend. 109; Esterly *v.* Cole, *supra*.

(*d*) Klock *v.* Robinson, 22 Wend. 157; Prescott *v.* Parker, 4 Mass. 170;

or an account liquidated. (*e*) For goods sold, interest accrues after the day of payment; (*f*) On an unsettled claim, after a demand of payment. (*g*) For rent to be paid at a fixed time, interest is payable from the time the rent becomes due, (*h*) even if it be payable in specific articles. (*i*) For money paid for the use of another, interest is due from the time of payment. (*j*) So it has been held in cases of money lent. (*k*) If the money is due now, but not payable until some act of the promisee, as if payable on demand, then that act must take place before any claim for interest can accrue. (*l*)

In England, the weight of authority would seem to establish a different rule; namely, that interest should not be added in the amount of damages, unless there be a distinct contract to pay interest; (*m*) but there also this contract may be im-

Gwinn *v.* Whitaker, 1 H. & J. 754; Hodgdon *v.* Hodgdon, 2 N. H. 169.

(*e*) Blaney *v.* Hendrick, 3 Wils. 205; Walden *v.* Sherburne, 15 Johns. 409, 424; Liotard *v.* Graves, 3 Caines, 226, 234; Elliott *v.* Minott, 2 McCord, 125.

(*f*) Crawford *v.* Willing, 4 Dallas, 286, 289; Bate *v.* Burr, 4 Harrington, 130; Porter *v.* Munger, 22 Vt. 191; Esterly *v.* Cole, 3 Comst. 502.

(*g*) McIlvaine *v.* Wilkins, 12 N. H. 474; Gammell *v.* Skinner, 2 Gall. 45; Barnard *v.* Bartholomew, 22 Pick. 291; See Goff *v.* Rhehoboth, 2 Cush. 475.

(*h*) Clark *v.* Barlow, 4 Johns. 183; Williams *v.* Sherman, 7 Wend. 109; Dennison *v.* Lee, 6 G. & J. 383; Elkin *v.* Moore, 6 B. Mon. 462; Buck *v.* Fisher, 4 Whart. 516.

(*i*) Lush *v.* Druse, 4 Wend. 313; Van Rensselaer *v.* Jewett, 5 Denio, 135, S. C. 2 Comst. 135; Van Rensselaer *v.* Jones, 2 Barb. 643. But see Phillips *v.* Williams, 5 Gratt. 259.

(*j*) Gibbs *v.* Bryant, 1 Pick. 118; Sims *v.* Willing, 8 S. & R. 103; Goodloe *v.* Clay, 6 B. Mon. 236; Reid *v.* Rensselaer Glass Factory, 2 Cow. 393, 5 id. 589.

(*k*) Dilworth *v.* Sinderling, 1 Binney, 488; Liotard *v.* Graves, 3 Caines, 226; Reid *v.* Rensselaer Glass Factory; but in Hubbard *v.* Charlestown Branch R. R. Co., 11 Met. 124, where a party had overdrawn money at a bank, by mistake, it was held that interest could not be recovered until after demand made or some default in payment. See Simons *v.* Walter, 1 McCord, 97; King *v.* Diehl, 9 S. & R. 409. See 1 American Leading Cases, 341, where in a note under Selleck *v.* French, the whole subject of interest is thoroughly considered.

(*l*) Jacobs *v.* Adams, 1 Dallas, 52; Hunt *v.* Nevers, 15 Pick. 500; Breyfoyle *v.* Beckley, 16 S. & R. 264; Nelson *v.* Cartwell, 6 Dana, 7; Henderson *v.* Blanchard, 4 La. Ann. 23.

(*m*) DeBernales *v.* Fuller, 2 Camp. 426; Attwood *v.* Taylor, 1 M. & G. 279, note. In De Havilland *v.* Bowerbank, 1 Camp. 50, Lord *Ellenborough* said, that "He thought, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used." In Calton *v.* Bragg, 15 East, 223, Lord *Ellenborough* said, "Lord *Mansfield* sat here for upwards of 30 years; Lord *Kenyon* for above 13 years, and I have now sat here for more than 9 years; and during this long course of time, no case has occurred where, upon a simple contract of lending, without an agreement for payment of the principal at a certain

plied from the usage of trade, or from other circumstances. (*n*) In this country the rule seems to be well established, that whoever receives money not his own and detains it from the owner unlawfully, must pay interest therefor. Hence a public officer retaining money wrongfully is chargeable with interest during the time of such wrongful detainer. (*o*) So an agent unreasonably neglecting to inform his principal of the receipt of money, is liable for the interest from the time when he should have communicated such information. (*p*) But an agent is not generally liable for interest on funds in his hands, unless he uses them, or is in default in accounting for them. (*q*) Interest is recoverable on money fraudulently obtained and withheld. (*r*)

Generally, where unliquidated damages are demanded, interest is not payable; nor is it in actions grounded on tort. But even in these actions, it is true that interest is excluded in name rather than fact. That is, the jury may make use of it in their own estimate of damages, if all the circumstances of the case lead to the inference that there was a contract or understanding that interest should be paid, or, if they should be satisfied that the plaintiff would not be adequately and justly compensated or indemnified without the allowance of interest. (*s*)

time, or for interest to run immediately, or under special circumstances from which a contract for interest was to be inferred, has interest been ever given."

(*n*) Eddowes *v.* Hopkins, 1 Doug. 375; Moore *v.* Voughton, 1 Stark. 487; Blaney *v.* Hendrick, 3 Wils. 205, 2 W. Bl. 761. Where the principal is to be paid at a specific time, an agreement to pay interest after that time is implied. Robinson *v.* Bland, 2 Burr. 1086; Calton *v.* Bragg, 15 East, 226, per Lord *Ellenborough;* Boddam *v.* Riley, 2 Bro. C. C. 2; Mountford *v.* Willes, 2 B. & P. 337.

(*o*) Commonwealth *v.* Crevor, 3 Binney, 123; Crane *v.* Dygert, 4 Wend. 675; People *v.* Gutherie, 9 Johns. 71; Hudson *v.* Tenney, 6 N. H. 456.

(*p*) Dodge *v.* Perkins, 9 Pick. 368.

(*q*) Ellery *v.* Cunningham, 1 Met. 112; Bedell *v.* Jenney, 4 Gilman, 194; Williams *v.* Storrs, 6 Johns. Ch. 353.

(*r*) Wood *v.* Robbins, 11 Mass. 504. See *supra,* note (*a*).

(*s*) Arnott *v.* Redfern, 3 Bing. 353; Dox *v.* Dey, 3 Wend. 356; Hull *v.* Caldwell, 6 J. J. Marsh. 208; Sargent *v.* Franklin Ins. Co. 8 Pick. 90. In Anerum *v.* Slone, 2 Speers, 594, *Frost,* J., in delivering the opinion of the court, said; "The first [ground of appeal,] presents the question of law, whether, in a special action on the case, in assumpsit on a warranty of soundness, interest is recoverable *eo nomine.* It is necessary to the allowance and estimate of interest, to ascertain the sum due, and the time when payable. Accordingly, all engagements or acknowledgments in writing, expressing the sum due and the time of payment, have been recognized as liquidated demands, and on them it has been permitted to recover interest by way of damages. Interest has also been allowed in liabilities to pay money, though not in writing, if the sum is certain or capable of being reduced to certainty, from the time when

SECTION II.

WHAT CONSTITUTES USURY.

The statutes of usury in this country have been copied, in substance, but with more or less variation of form, from the 12 Anne, stat. 2, ch. 16, which provides that no person shall take, directly or indirectly, upon any contract, "for loan of any moneys, wares, merchandise, or other commodities what-

either by the agreement of the parties or the construction of law, the payment was demandable. As in cases of money had and received, paid for the use of another, or by mistake, or on an account stated; and on open accounts by express agreement; and when, by the course of dealing between the parties or the usage of trade, such agreements may be inferred. The time of payment must also be determined, either by the agreement of the parties, the course of dealing between them, by known custom, or the usage of trade. Thus open accounts do not bear interest, though the sum is certain; because by custom the credit is indefinite. But if there be an agreement, expressed or implied, it is allowed accordingly. It is not recoverable on a *quantum meruit*, for work and labor, nor *quantum valebet*, for goods sold, nor on a verbal contract to pay a sum certain for rendering a service, 1 Hill, 393; nor on a due-bill, payable on demand, though expressed to be for a loan of money, on the day of the date, except from the time of demand, 2 Bail. 276; nor on a balance of a factor's account, due to his employer, except from the time of demand. 1 Hill, 400. Other cases might be adduced to show that the general rule is to allow interest, *eo nomine*, only on money demands certain or capable of being reduced to certainty, and payable at a definite time, either expressly or impliedly. There may be some exceptions to the rule, and its application has been extended by construction of law. Thus, on a breach of warranty, if the contract be rescinded by a tender of the property to the seller, *indebitatus assumpsit* will lie for the price paid, as money had and received by the vendor to the use of the vendee, and interest may be recovered. And in covenant, on a warranty of title, interest may be found, in addition to the value, for a total or partial eviction. These cases proceed on the ground of a rescision of contract and restitution to the plaintiff of the price paid. But a special assumpsit, on a warranty of soundness, for damages, is subject to the rule governing actions sounding in damages, that interest is not recoverable *eo nomine*. In Holmes *v.* Misroom, 1 Ired. 21, which was a special assumpsit, the law is thus affirmed by Nott, J.: "This was a special action on the case, sounding altogether in damages, and therefore could not carry interest. I think the jury might have made the value of the property and interest thereon the measure of damages, and found a verdict for the aggregate amount; but no law has been introduced to show that they could give interest *eo nomine*, in an action of this sort." . . . To the argument, if interest may be allowed in the aggregate damages found by a verdict, why may it not be allowed *eo nomine?* The reply is, the law does not inquire into the particulars of a verdict for damages, and in some cases interest furnishes a just and convenient measure for the jury. But it is a stated compensation for the use of money, and as it cannot be separated, even in idea, from debt, seems not properly incident to uncertain and contingent damages. The distinction is admitted to be one of form, depending upon the form and cause of action." In the same way interest may be taken into account by the jury, in assessing damages in trespass and trover; Hyde *v.* Strong, 7 Wend. 354; Beals *v.* Guernsey, 8 Johns. 446; Kennedy *v.* Whitwell, 4 Pick. 466. And in replevin; Rowley *v.* Gibbs, 14 Johns, 385; Suydam *v.* Jenkins, 3 Sandf. 614.

soever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time;" and that "all bonds, contracts, and assurances whatsoever, for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void;" and further provides that any person who shall take more than five pounds per cent., contrary to the provisions of the statute shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandises, and other things so lent. (*t*) Our statutes differ greatly as to the amount which may be taken or received, the legal interest in each State being intended to represent the fair worth of money, and that varying greatly in different parts of this country. They differ also very much in the penalties with which they visit the offence of usury.

Originally the principle of the statute of Anne was adopted generally, if not universally, and the whole debt forfeited. Afterwards, there was a considerable relaxation in this respect; but with some fluctuation and a return to severity; and now usury works, generally, a forfeiture of the usurious interest and some part of the principal or the lawful interest, by way of penalty.

The simplest definition of usury is, the taking of more interest for the use of money than the law allows. There must therefore be the use of money; which may be by a loan, or by the continuance of an existing debt. That is, one may now lend money to another, and so give him the use of it, or may agree with him that he shall not now repay a sum which has become due, and so permit him to use it. (*u*)

(*t*) By the 3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, enlarging the statute of William, all contracts were taken from the operation of the statute of Anne, except those contained in bills of exchange and promissory notes having more than twelve months to run, those for the loan of money less in amount than the sum of ten pounds sterling; and excepting also contracts for "the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." Any usurious contract is therefore valid in England, with the above excepted cases. Thibault *v.* Gibson, 12 M. & Wels. 88.

(*u*) It is well settled that if there be a contract for the payment of illegal interest, for the further forbearance of a

To the one or the other of these classes all contracts for the use of money may be referred. And, to constitute the offence of usury, there must be an agreement that he who has the use of the money shall pay to the owner of it more than lawful interest; that is, more than the law permits to be paid for the use of money.

SECTION III.

IMMATERIALITY OF THE FORM OF THE CONTRACT.

It is entirely immaterial in what manner or form or under what pretence this is done. (*v*) And countless are the devices by which usurers endeavor to avoid the provisions of the

debt at that time existing, or if money be actually paid for such forbearance, it is usury. Parker *v.* Ramsbottom, 5 Dowl. & R. 138, 3 B. & Cr. 257, *post,* n. Evans *v.* Negley, 13 S. & R. 218; Hancock *v.* Hodgson, 3 Scam. 333; Carlis *v.* McLaughlin, 1 Chipman, 112; Seneca County Bank *v.* Schermerhorn, 1 Den. 135; Gray *v.* Belden, 3 Flor. 110; Craig *v.* Hewitt, 7 B. Mon. 476; Young *v.* Miller, 7 B. Mon. 540. See also, Pollard *v.* Scholy, Cro. Eliz. 20.

(*v*) Symondos *v.* Cockerill, Noy's Rep. 151; Burton's case, 5 Co. 69; Richards *v.* Brown, Cowp. 770; Doe *d.* Metcalf *v.* Brown, Holt, 295; Marsh *v.* Martindale, 3 B. & Pull. 154. In Floyer *v.* Edwards, Cowper, 112, Lord *Mansfield* said, "In all questions in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other, and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money nothing will protect the taking more than five per cent., and though the statute mentions only 'for loan of moneys, wares, merchandises, or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" And in Scott *v.* Lloyd, 9 Peters, 446, in which the *bonâ fide* purchase of an annuity is admitted to be valid, although more than six per cent. profit be secured. *Marshall*, C. J., said; "Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it." See also Tate *v.* Wellings, 3 T. R. 531; Chesterfield *v.* Janser, 1 Atk. 340; Lawley *v.* Hooper, 3 Atk. 278; Drew *v.* Power, 1 Sch. &. Lef. 182; Hammett *v.* Yea, 1 Bos. & Pull. 151; Douglass *v.* McChesney, 2 Rand. 112; Andrews *v.* Pond, 13 Peters, 65; Tyson *v.* Rickard, 3 Harr. & Johns. 113; Bank of the U. S. *v.* Waggener, 9 Pet. 379; Bank of U. S. *v.* Owens, 2 Pet. 536, 537; Lloyd *v.* Scott, 4 Pet. 226; Shober *v.* Hauser, 4 Dev. & Bat. 91; Delano *v.* Rood, 1 Gilman, 690; Spaulding *v.* Bank of Muskingum, 12 Ohio, 544; Pratt *v.* Adams, 7 Paige, 616; Dowdall *v.* Lenox, 2 Edw. Ch. 267; Seymour *v.* Strong, 4 Hill, 255; *per Cowen*, J., 4 Hill. 475; Ely *v.* Mc Clung, 4 Port. 128; Clarkson's Admr. *v.* Garland, 1 Leigh, 147; Steptoe's Admrs. *v.* Harvey's Exrs. 7 Leigh, 501; Brown *v.* Waters, 2 Maryl. Ch. Dec. 201; Wright *v.* Alexander, 11 Ala. 236; Williams *v.* Williams, 3 Green, 255; Heytle *v.* Logan, 1 A. K. Marsh. 529.

statute; as, by lending a thousand dollars on a note for a year at lawful interest and immediately receiving half of it back again in payment; or by selling some property, at the time of the loan, at an exorbitant price. (*w*) In this case a nice distinction has been made as to the onus of proving value. In general, the lender or nominal seller is not called upon to prove that the value of the goods purporting to be sold and delivered instead of the whole or a part of the money required,

(*w*) See Lowe *v.* Waller, Doug. 736. In this case the defendant applied several times to Harris & Stratton to obtain the discount of a bill for 200*l.*, who had replied that they could not advance money, but only goods. Subsequently the defendant agreed to take a certain quantity of goods, which were delivered to him, and the bill of exchange delivered to Harris & Stratton, together with collateral security for its payment. The goods were disposed of by the defendant to an auctioneer, for 120*l.* In an action upon the bill, against the defendant, to which the defence of usury was pleaded, Lord *Mansfield* directed the jury that they were to consider whether the transaction between the defendant and Harris & Stratton was not, in truth, a loan of money, and the sale of goods a mere contrivance and evasion. The jury having found the contract usurious, a rule for a new trial was granted, and subsequently Lord *Mansfield* delivered the opinion of the court discharging the rule. In Barker *v.* Vansommer, 1 Brown's Ch. 148, the plaintiff had given a promissory note to Vansommer & Co. for 2,224*l.*, upon receiving from them silks valued by the parties at that amount, but which were sold by the plaintiff for 799*l.* This bill was brought by the plaintiff to have the note given up. Lord *Thurlow* said that the court was to inquire whether, under the mask of trading, this was not a method of lending money at an extraordinary rate of interest, and that there was not a doubt that the transaction was merely for the purpose of raising money. A decree for relief was made. In Doe *d.* Davidson *v.* Barnard, 1 Esp. 11, which was an action upon a mortgage, the defendant proved that the mortgage debt was the delivery of stock to the defendant, at 75 per cent. on its value, which he was compelled to sell at 73 per cent., the market price at that time. Lord *Kenyon* held the transaction clearly usurious. See also Pratt *v.* Willey, 1 Esp. 40. The proposition that where upon negotiations for a loan the borrower receives depreciated bank notes, or property of any kind of a less value than the nominal amount of the loan, such transaction is usurious, is supported by the following American authorities: Delano *v.* Rood, 1 Gilman, 690; Morgan *v.* Schermerhorn, 1 Paige, 544; Grosvenor *v.* Flax & Hemp Manf. Co. 1 Green's Ch. 453; Valley Bank *v.* Stribling, 5 Rand. 132; 7 Leigh, 26; Greenhow's Adm'x. *v.* Harris, 6 Munf. 472; 2 Deo. 333; Archer *v.* Putnam, 12 Sm. & M. 286; Swanson *v.* White, 5 Humph. 373; Anonymous, 2 Desaus. 333; Bank of U. S. *v.* Owens, 2 Peters, 527: Rose *v.* Dickson, 7 Johns. 196; Dry Dock Bank *v.* Amer. Life Ins. & Trust Co. 3 Coms. 344; Douglass *v.* McChesney, 2 Rand. 109; Stribling *v.* Bank of the Valley, 5 Rand, 132; Ehringhaus *v.* Ford, 3 Ire. L. 522; Eagleson *v.* Shotwell, 1 Johns. Ch. 536; Pratt *v.* Adams, 7 Paige, 615; Weatherhead *v.* Boyers, 7 Yerg. 545; Collins *v.* Secreh, 7 Monr. 335; Burrham *v.* Gentry, Ibid, 354; Warfield's Adm's. *v.* Boswell, 2 Dana, 225; Moore's Exr. *v.* Vance, 3 Dana, 366, 367. But where the transaction is a sale, and not a shift to cover a loan, depreciated bank notes or stock may be disposed of at a rate above their current market value without usury. Bank of the U. S. *v.* Waggener, 9 Pet. 400; Willoughby *v.* Comstock, 3 Edw. Ch. 424. And where the discount upon uncurrent money is very trifling, and the same will pass in the market in the way of trade, it seems that its reception at par is no violation of the statute. Slosson *v.* Duff, 1 Barb. 432. Or if the borrower has the option of returning the depreciated bank notes at the same rate at which he received them, this it seems prevents the transaction from being usurious. Caton *v.* Shaw, 2 H. & Gill, 14.

was great enough to relieve the contract from usury; (*x*) but, if it is shown that the borrower was compelled to receive the goods, this casts suspicion on the transaction, and the lender is now obliged to exculpate himself by proof of their value. (*y*) Where, however, as in the case just supposed, goods are delivered and received as a part or the whole of the money advanced, and the borrower sells them, he cannot keep the price by proving the contract to be usurious, nor is he answerable for them in their value at the time they were delivered; but for what he actually receives; as it is considered that they were given him to be sold. Some of the devices resorted to it is difficult to detect or to prevent; but in all cases, the only question for the jury is, has one party had the use of the money of the other, and has he paid him for it more than lawful interest in any way or manner. And in this determination the contract will not be held good, because, upon its face, and by its words, it is free from taint, if substantially it be usurious, nor, if it be in words and form usurious, will it be held so, if in substance and fact it is entirely legal. (*z*) And these questions are for the jury only, who must judge of the intention of the parties, which lies at the foundation of the inquiry, from all the evidence and circumstances. (*a*) And the questions which are presented

(*x*) Rich *v.* Topping, 1 Esp. 176; Coombe *v.* Miles, 2 Camp. 553; Grosvenor *v.* Flax & Hemp Manf. Co. 1 Green's Ch. 453.

(*y*) Hargreaves *v.* Hutchinson, 2 Ad. & E. 12; Davis *v.* Hardacre, 2 Camp. 375. In this case the defendant applied to the plaintiff to discount a bill of exchange of 700*l.* for him. The plaintiff refused to do so unless the defendant would take a check for 250*l.*, a promissory note for 286*l.*, and a landscape in imitation of *Poussin*, to be valued at 150*l.* The action was brought by the plaintiff upon the bill. Lord *Ellenborough* said: "Where a party is compelled to take goods, in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who owes on the bill. In the present case I must require such evidence to be adduced; and I wish it may be understood that in similar cases, this is the rule by which I shall be governed for the future. When a man goes to get a bill discounted, his object is to procure cash, not to encumber himself with goods. Therefore if goods are forced upon him, I must have proof that they were estimated at a sum for which he could render them available upon a re-sale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them."

(*z*) *Per* Lord *Tenterden*, C. J., Beete *v.* Bidgood, 7 B. &. Cr. 458; Andrews *v.* Pond, 13 Peters, 76.

(*a*) Doe *d.* Metcalf *v.* Brown, 1 Holt, N. P. 295; Masterman *v.* Cowrie, 3 Camp. 488; Carstairs *v.* Stein, 4 M. & Sel. 192; Smith *v.* Brush, 8 Johns. 84; Thomas *v.* Catheral, 5 Gill & J. 23; Tyson *v.* Rickard, 3 Harr. & John. 109; Stevens *v.* Davis, 3 Mete. 211; Andrews *v.* Pond, 13 Pet. 76, 77.

thus are sometimes extremely nice. Thus a contract to borrow stock, valued at more then the market price, and to pay lawful interest on this valuation, would, in our opinion, be usurious, although the interest reserved might be no more than the stock earns; (*b*) but if the stock be sold, and the money arising be loaned, with an agreement to replace the stock on a certain day, and to pay such interest as the stock would have earned in the mean time, it is not usurious. (*c*)

(*b*) In Parker *v.* Ramsbottom, 5 D. & Ry. 138; 3 B. & Cr. 257; B. & C. being indebted to the plaintiff for 15,000*l.* in stock previously advanced, it was agreed between the parties that B. & C. should be released from replacing the stock, and that instead thereof they should account for it in money, at the value of 10,000*l.*, paying 5 per cent. interest thereon until the principal and all interest should be repaid. At the date of this agreement the market value of the stock was only 8,400*l.* The plaintiff claimed, upon the issue in this case, to prove, under a commission of bankruptcy against B. & C., the amount of his claim under this agreement. *Abbott*, C. J., said: "It appears to me that the agreement is clearly void for usury, because it secures to the plaintiff the sum of 10,000*l.* as the value of the stock then remaining to be replaced, though the real value of that stock was then only 8,400*l.*" *Bayley*, J., said: "I entertain no doubt that the agreement was usurious, and consequently void. The statute evidently applies to loans of goods, or anything that can be called money's worth, as well as loans of money itself. In this case the original bargain was for the return of a loan of stock, which was a perfectly legal bargain; that stock, when first sold out, produced 10,000*l.*, but when the second bargain was made it was worth only 8,400*l.*; therefore at that time the plaintiff was lending a stock worth 8,400*l.* only, and stipulating to be repaid by 10,000*l.*, with legal interest on that larger sum. That was certainly usurious." In Astor *v.* Price, 7 Martin N. S. 408, which was an action on certain bills of exchange, the defence was usury. The consideration for the bills was a loan, purporting to be $64,000, for which the plaintiff charged interest; but he disbursed only $8,850 in cash, and the remainder of the loan was United States Bank stock, at the rate of 105\frac{5}{8}$ per share, when the market value at that time was only 104\frac{1}{8}$ or thereabouts. The court *held* the transaction usurious and the bills void.

(*c*) Tate *v.* Wellings, 3 T. R. 531. Here the defendant applied to the plaintiff's testator to borrow money, the testator agreed to let him have it, but told him that he should expect the same interest which he received in the short annuities, namely 8$\frac{1}{2}$ per cent. and which, being assented to, it was agreed that the money should be raised by a sale of short annuities, to the amount of 900*l.*, which the defendant was to replace, in the same stock, by the first of September, 1785; but if it were not replaced by that time he was then to repay that sum on the first of January, 1786, and in the meantime to pay such interest as the stock would have produced. The jury having found that the transaction was an honest loan of stock, the court refused to disturb the verdict. *Ashhurst*, J., said, "The question is, whether this transaction was merely colorable, and intended as a loan of money, upon which usurious interest was to be taken, or a loan of stock. It appeared from the evidence that in substance this was a loan of stock. The agreement was, that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which time the lender was to run the risk of the fall of the stocks; but he stipulated that, if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events. And from this contract he derived no advantage, for he was only to receive in the meantime the same interest which the stock would have produced. Now though this might have been used as a

So one may lend stock to be replaced; (*d*) or, he may lend the price which it is sold for; or he may give the borrower the option, either to replace the stock or repay the money, with interest; but if he reserves this option to himself it is held to be usurious. (*e*) The lender may lend stock, and reserve by way of interest, the dividends which would be paid on it, whatever they may be, provided he agrees at the

color for usury, it was a question for the consideration of the jury, and they have negatived it."

(*d*) Forrest *v.* Elwes, 4 Ves. 492. In this case 8,000*l.* old South Sea annuities were loaned, the value at the time being 7,170*l.*, and a bond given by the borrower to replace the stock in six months, and in the meantime to pay lawful interest on 7,170*l.* It was contended that the bond was, upon the face of it, a usurious contract; but the point was afterwards given up, and the Master of the Rolls decreed the bond good.

(*e*) Barnard *v.* Young, 17 Ves. 44. In this case 8,500*l.* East India Stock was transferred, as security for the performance of an agreement that 16,096*l.* of the three per cents, which was the amount of three per cents that 10,000*l.* would have purchased at the date when a debt for 10,000*l.* had become due from the plaintiffs to the defendant, should be transferred to the defendant on the 30th of the next September, or that the debt of 10,000*l.* should be paid, at the defendant's option, and that in either case five per cent. interest upon the 10,000*l.* should be paid to the defendant. Upon a bill filed to have the assignment of the East India Stock produced, Sir *William Grant*, M. R., said that the contract was usurious, as it reserved the capital, with legal interest upon it, and likewise a contingent advantage, without putting either capital or interest in any kind of risk. The lender was to have, at his election, his principal and interest, or to have a given quantity of stock transferred to him. This principal never was at any hazard, as he was at all events sure of having that with legal interest, and had the chance of an advantage if the stock rose. It was usurious to stipulate for that chance, and the contract was therefore, in fact, a usurious contract. In White *v.* Wright, 3 B. & Cr. 273, White sold out 400*l.* stock, in the three per cent. consolidated bank annuities, for 223*l.*, which he loaned to the defendant, who executed an agreement that after one year she would, if requested, transfer to White 400*l.* like stock, and would in the meantime pay all dividends which the stock would produce. The defendant also executed a bond to White, conditioned for the payment of 223*l.* and interest, to him, on a certain date. The present action was brought upon the agreement to transfer the stock. *Abbott*, C. J., said, "Here if the lender, after receiving five per cent. interest on his money, had afterwards, on a rise in the stocks, compelled the defendant to replace the stock sold, he would have had principal, interest, and a premium besides. That is an advantage which by law he was not entitled to contract for. The contract was therefore usurious." *Bayley*, J., said, "A party may lawfully lend stock as stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay it, either in the one way or the other. But he cannot legally reserve to himself a right to determine, in future, which it shall be. It is not illegal to reserve the dividends, by way of interest for stock lent, although they may amount to more than 5*l.* per cent. on the produce of it; for the price of stock may fall, and then the borrower would be a gainer; but the option must be made at the time of the loan. The instruments set out in this case show that an option to be exercised in future was reserved." And the court ordered a nonsuit. In Chippindale *v.* Thurston, 1 M. & Mal. 411, 500*l.* was loaned, and the borrower agreed to repay it in three per cent. consols, at a price not exceeding 68½ per cent., or to repay it in Bank of England notes upon six months' notice. The court ordered a nonsuit, on the ground that the option was with the lender, and the contract therefore clearly usurious, as he could not have less than five per cent. interest, and might have more than the 500*l.* lent, if the funds rose above 68½.

time of the loan to take them; (*f*) for they may be more or less than the interest; but he cannot contract that he shall have them, if more than the interest, and otherwise the interest.

If a contract be in part for usurious interest, and it is made by two instruments, one promising to pay the principal, with or without lawful interest, and the other promising to pay the usurious interest as a principal, with or without interest, it would seem that it is not this last promise alone which is void, but both, because both together form one contract, which is tainted with usury. (*g*) So, if there be a note, and a separate oral promise to pay usurious interest, the note is void. (*h*) The authorities differ on this point, but the prevailing rule is, that if the design of the whole transaction, and the inducement to it, are to lend money on usurious interest, the taint of usury affects the whole and every part of the contract, and no one portion thereof, although in form an independent contract, is made valid by the fact that taken by itself it is free from objection. The very fraud consists

(*f*) *Bayley*, J., White *v.* Wright, 3 B. & Cr. 278. in note (*e*) *supra*. See. also Potter *v.* Yale College, 8 Conn. 52.

(*g*) In Roberts *v.* Trenayne, Cro. Jac. 507; Mary Addington loaned Cory 150*l*., and for security of its repayment Cory leased to Mary Addington a close for sixty years, conditioned to become void if he paid the 150*l*. within two years. It was then further agreed that Cory should give to Mary Addington annual interest of twenty-two pounds ten shillings, by means of a grant, by fine, of a rent charge, which was done. Cory afterwards granted the inheritance to the plaintiff, who brought this action of trespass against the defendant, husband of Mary Addington. "It was moved, whether this lease, being taken for the payment of the principal money, and not for the payment of any part of the usury, be within the statute, to make the bargain void? — *It was resolved*, that it is; because it is for the security of money lent upon interest, and for the securing of that which the statute intends he should lose; for otherwise it would be an evasion out of the statute, that he would provide for the securing of the payment of the principal, whatsoever usurious bargain was made, which the law will not permit." In White *v.* Wright, 3 B. & Cr. 273; *ante*, p. 389, n. (*e*) White loaned the defendant 400*l*. stock, and received an agreement to re-transfer 400*l*. like stock, and in the meantime pay the dividends the stock would earn. By another agreement the defendant agreed absolutely to pay 223*l*. and interest, to the plaintiff, on a certain day. This action was brought upon the first agreement to re-transfer the stock. The first agreement, although lawful in itself, was held, upon the authority of Roberts *v.* Trenayne, to be vitiated by the other bond for the payment of illegal interest. To the same effect are Motte *v.* Dorrell, 1 McCord, 350; Clark *v.* Badgley, 3 Halst. 233; Postlethwait *v.* Garrett, 3 Monroe, 345; Fitch *v.* Hamlin, 1 Root, 110; Swartwout *v.* Payne, 19 Johns. 294; Gray's Exrs. *v.* Brown, 22 Ala. 273.

(*h*) Merrills *v.* Law, 9 Cow. 65; Macomber *v.* Durham, 8 Wend. 550; Hammond *v.* Hopping, 13 Wend. 505; Willard *v.* Reeder, 2 McCord, 369; Lear *v.* Yarnel, 3 A. K. Marsh. 419; Atwood *v.* Whittlesey, 2 Root, 37; *contrà*, Butterfield *v.* Kidder, 8 Pick. 512.

in disguising usury, by separating the contract into these parts. (*i*) The common way in which, in our mercantile cities, the usury laws are now evaded, we suppose to be this; a valid bargain is made for the payment of the money with interest. The additional bonus or premium is left entirely at the pleasure of the borrower, with the understanding that the worth of money at that time is a certain per cent. Then there is no contract which is not legal; if when the money is due, nothing but simple interest is paid, nothing more can be demanded by any contract, and the lender trusts to the fact that a borrower, who thus executes only his contract, would not be able to borrow more. But if this understanding assumes distinctness enough to become a *contract* for the repayment of additional interest, we are satisfied that the penalties of the usury law would attach to it. The difficulty of distinguishing between a mere understanding and a promise might often be great. If money was actually paid for the use of the sum loaned, over and above the lawful interest, a similar question would arise, whether it was paid in pursuance of a contract to pay, so that the penalty would be incurred; or whether it was a mere gratuity. The rule of law must be, that if A. lends to B. a sum for a given time, on simple interest, and B., on paying this money, manifests his gratitude for the accommodation by a free gift to A. either of money or a chattel, there is no usury in this; but if the money is paid, or a chattel given, in performance of a previous promise to pay, then the penalty of usury must attach; and in each case it must be a question of fact whether the payment is in the nature of a gift, or of the execution of a promise.

It should be remarked, that if a foreign contract provides for interest which is lawful where the contract is made, it will not be declared void for usury in a State in which only a less interest is allowed by law. (*j*) But if a usurious con-

(*i*) Ibid; Warren *v.* Crabtree, 1 Greenl. 171.

(*j*) Harvey *v.* Archbold, 3 B. & Cr. 626; Thompson *v.* Powles, 2 Sim. 211; DeWolf *v.* Johnson, 10 Wheat. 367; Chapman *v.* Robertson, 6 Paige, 627; Pratt *v.* Adams, 7 Paige, 615. See on this subject, *ante*, p. 97, n. (*e*). Nichols *v.* Cosset, 1 Root, 294; M'Queen *v.* Burns, 1 Hawks, 476; M'Guire *v.* Parker's Exrs. 1 Wash. 369; Robb *v.* Halsey, 11 Sm. & M. 141. See also Gale *v.* Eastman, 7 Mete. 14; Jacks *v.* Nichols, 1 Selden, 178; Davis *v.* Garr,

tract is made in a State in which it is wholly void, because of such usury, it cannot be recognized in another State in which the penalty is a forfeiture of a part only, and enforced there for all but this part. (*k*)

SECTION IV.

THE CONTRACT ITSELF MUST BE TAINTED WITH THE USURY.

In order that a contract or debt should be avoided as usurious, it is necessary that it should *itself* be tainted with this offence; for if any subsequent contract in payment of the first be usurious, this second contract will be void, and will therefore leave the original contract or debt wholly unpaid, and it may enforced as if the second had not been made. (*l*) Thus, if one who, as joint surety, has paid the

*2 Seld. 134; Turpin *v.* Povall, 8 Leigh, 93.

(*k*) Houghton *v.* Page, 2 N. H. 42.

(*l*) Radley *v.* Manning, 3 Keb. 142, pl. 13. "In debt upon an obligation, upon oyer the condition was to pay by a certain day. The defendant pleaded the statute, 12 Car. 2, and said that the contract was usurious, but *per curiam*, being made after the bond forfeited to receive interest, according to the penalty, which was double the principal, it doth not void the obligation that was good at first, but only subjects the taker to other penalties, and judgment for the plaintiff." In Anonymous, 1 Bulstrode, 17, T. N. executed to J. P. a bond for 66*l.* 6*d.* principal, and 6*l.* legal interest, payable in one year. Within the year the obligor paid the 6*l.* interest and afterwards an action being brought for the non-payment of the principal the obligor pleaded the statute of usury, because the obligee took the use money within the year. "It was resolved by the whole court, that his taking of the use money within the year shall not avoid the obligation, and that this taking is no usury within the statute." *Williams*, Justice, "Where the first contract is not usurious, this shall never be made usury, within the statute, by matter *ex post facto*; as if one contract with another to borrow 100*l.* for a year, and to give him 10*l.* for interest, at the end of the year, if he pays the interest within the year, this is not usury within the statute, to avoid the obligation, or to give a forfeiture of the money within the statute, because that this contract was not usurious at the beginning; which was agreed by the whole court, and judgment given for the plaintiff." In Pollard *v.* Scholy, Cro. Eliz. 20, Pollard sold defendant two oxen, for six pounds six shillings and eight pence, to be paid at All Saints next, and on the same day the defendant required longer day of payment, upon which Pollard gave him till the first of May next, receiving therefore three quarters of wheat, which was above the value of ten pounds per cent. upon the debt. In debt for the price of the oxen, usury was set up as a defence. The opinion of the justices was that the last contract was void, but the first good, being made *bonâ fide*. Ferrall *v.* Shaen, 1 Saund. 294, was debt upon a bond, for payment of 300*l.*, to which the defendant pleaded that the plaintiff had received 30*l.* for delaying the day of payment of the bond one year, which was usurious. The court adjudged the plea not good, for here the bond was good when it was made, and then a usurious contract afterwards cannot make it void, although the penalty for usury was incurred. In Nichols *v.*

whole of a debt, and so acquired a claim for contribution for one half, settles this claim by receiving a note with usurious interest, this note cannot be collected, but the original claim for contribution revives and may be enforced. (*m*) So an agreement to pay more than interest, by way of penalty for not paying the debt, is not usurious, because the debtor may relieve himself by paying the debt with lawful interest, and even if he incurs the penalty, this may be reduced to the actual debt. (*n*) And if money be due, and the creditor, at the re-

Lee, 3 Anstr. 940, where to debt upon a bond, the plea was, that after the execution of the bond the plaintiff received from the defendant more than lawful interest, *Macdonald*, C. B., said: "There is nothing more settled than this point; to avoid a security as usurious, you must show that the agreement was illegal from its origin." The same principle is established in the following cases: Ballard *v.* Oddey, 2 Mod. 307; Parr *v.* Eliason, 1 East, 92; Rex *v.* Allen, T. Raym. 196; Parker *v.* Ramsbottom, 3 B. & Cr. 257; *Supra*, n. (*b*); Phillips *v.* Cockayne, 3 Camp. 119; Gray *v.* Fowler, 1 H. Bl. 462; Daniel *v.* Cartony, 1 Esp. 274; *Buller*, J., Tate *v.* Wellings, 3 T. R. 532; Bush *v.* Livingston, 2 Caines's cases, 66; Nichols *v.* Fearson, 7 Pet. 107; Pollard *v.* Baylors, 6 Munf. 433; *Roane*, J., Pollard *v.* Baylor, 4 Hen. & Munf. 232; Merrills *v.* Law, 9 Cow. 65; Hughes *v.* Wheeler, 8 Cow. 77; Rice *v.* Welling, 5 Wend. 597; Swartwout *v.* Payne, 19 Johns. 294; Crane *v.* Hubbel, 7 Paige, 417; Brown *v.* Dewey, 1 Sandf. Ch. 57; *Johnson*, J., in Gaither *v.* Farmers and Mechanics Bank, 1 Pet. 43; Gardner *v.* Flagg, 8 Mass. 101; *Parker*, C. J., Frye *v.* Barker, 1 Pick. 267; Edgell *v.* Stanford, 6 Verm. 551; Hammond *v.* Smith, 17 Verm. 231; Sloan *v.* Sommers, 2 Green, (N. Jer.) 510; *Ruffin*, J., Collier *v.* Nevill, 3 Dev. 32; Indianapolis Ins. Co. *v.* Brown, 6 Blackf. 378; Varick *v.* Crane, 3 Green's Ch. 128; Brown *v.* Toell's Admr., 5 Rand. 543. See also Abrahams *v.* Bunn, 4 Burr. 2253.

(*m*) Johnson *v.* Johnson, 11 Mass. 350.

(*n*) Burton's case, 5 Co. 69; Vin. Abr. *Usury*, C. "If a man obliges himself in nine marks, to pay at a certain day, and that if he does not pay at the day, he obliges himself by the same deed to pay to him seventeen marks; this is not usury, but it is only a pain. 26 E. 3, 71." In Roberts *v.* Trenayne, Cro. Jac. 507, *Doderidge*, J., took this difference in cases of casual usury: "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one a hundred pounds for two years, to pay for the loan thereof thirty pounds, and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury, for the party hath his election; and may pay it at the first year's end, and so discharge himself." In Garret *v.* Foote, Comb. 133, *Holt* said, "If I covenant to pay 100*l.* a year hence, and if I do not pay it to pay 20*l.*, it is not usury, but only in the nature of a *nomine pœnæ*." In Groves *v.* Graves, 1 Wash. 1, there was an agreement for the payment of a debt, by the delivery of certificates of "Pierce's final settlements," at the rate of twenty shillings for every twenty-six pence of the money advanced, and if the debt was not paid at a certain time, that the certificates should be paid at the rate of twenty shillings for every thirteen pence. The *President* held that the agreement to pay certificates at half their value, was a penalty only, and the contract therefore not usurious. In Winslow *v.* Dawson, 1 Wash. 118, a debt for 200*l.* being due, two bonds were executed, one for 100*l.* the other for 150*l.* at a certain time, to which latter bond a memorandum was affixed that it might be discharged by the payment of 100*l.*, if paid at an earlier date than the time mentioned in the condition. The contract was held not usurious. The *President* said, "The case of Groves *v.* Graves, in this court, has decided this principle, viz.: that such a contract, to pay a larger sum at a future day, is not

quest of the debtor, agrees to give him time, on condition that the debtor shall continue to pay legal interest, and also such further interest as the creditor may be obliged to pay for money to be raised by him to take the place of the money due from the debtor, such agreement is not usurious; and if the debtor pay such extra interest, he cannot recover it back as a usurious payment. (*o*) Nor will the taking of usurious interest imply conclusively a prior agreement to take; as if a bond be given for principal and lawful interest, if usurious interest be taken afterwards, this does not prove conclusively that such was the secret original agreement; (*p*) although it is *primâ facie* evidence. (*q*) But by some authorities the presumption is only of an intentional new usurious contract at the time of payment. (*r*)

SECTION V.

SUBSTITUTED SECURITIES ARE VOID.

If the statute of usury provides that a usurious contract is void, then no subsequent circumstance can make the original contract good; and consequently a promissory negotiable note, void at its inception for usury, is equally void in the hands of innocent indorsees. (*s*)

usurious; but that the increased sum shall be considered as a penalty against which a court of equity ought to relieve, upon compensation being made." See also Cutler *v.* How, 8 Mass. 257; Pollard *v.* Baylors, 6 Munf. 433; *Roane*, J., Pollard *v.* Baylor, 4 Hen. & Munf. 232; Brock *v.* Thompson, 1 Bailey, 322; Campbell *v.* Shields, 6 Leigh, 517; *Fleming*, J., Call *v.* Scott, 4 Call, 409; Moore *v.* Hylton, 1 Dew. Eq. 429; Brockway *v.* Clark, 6 Ham. 45; Wight *v.* Shuck, 1 Morris, 425; Shuck *v.* Wight, 1 Green, (Iowa,) 128; Gambril *v.* Rose, 8 Blackf. 140; Lawrence *v.* Cowles, 13 Ill. 577; Thompson *v.* Jones, 1 Stewart, 564; Long *v.* Storie, 10 E. L. & E. 182; Floyer *v.* Edwards, Cowp. 112.

(*o*) Kimball *v.* Proprietors of Boston Athæneum. Decided by S. J. C. of Massachussetts, in March, 1855. The main ground of the decision was, that the gist of all the usury laws, from 1641 to 1846, is the taking of unlawful profits; whereas here there is no taking of any profit, by the creditor, who is, in fact, the agent of the debtor for raising the money.

(*p*) Fussil *v.* Brookes, 2 Carr. & P. 318; Hammond *v.* Smith, 17 Verm. 231.

(*q*) Ferrall *v.* Shaen, 1 Saund. 295, note; New York Firemen Ins. Co. *v.* Ely, 2 Cow. 705; Cummins *v.* Wise, 2 Halstead's Ch. 73; Varick *v.* Crane, 3 Green's Ch. 128; Quarles *v.* Brannon, 5 Strobh. 151.

(*r*) Hammond *v.* Smith, 17 Verm. 231.

(*s*) Lowe *v.* Waller, Doug. 736, *supra*, 2386, n. (*w*); Ackland *v.* Pearce, 2 Camp. 599; Young *v.* Wright, 1 Camp. 139; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66; Hackley *v.* Sprague, 10 Wend. 113; Lloyd *v.* Scott, 4 Pet. 228; Chadbourn

Whether a note, valid in its inception, but usuriously transferred by the payee or indorsee, is valid against the maker, has been variously decided. (*t*) And the authorities differ on the question whether such a note is valid as against the maker in the hands of the usurious indorsee himself; the objection being, that no rights can grow out of an illegal, and therefore, invalid transaction. (*u*) There are, however, cases of high authority which hold that the maker is liable to the indorsee, even if the indorser be not so liable, on the ground that the indorsement operates as an executed transfer of the property in the note, and does not remain executory, like the indorser's general liability to pay the note, on the maker's default. (*v*) In the section on the sale of notes, we shall consider this question, and give our reasons for holding that where such a transaction is a *bonâ fide* sale of the note, both maker and indorser are held for the whole face of the paper.

To remedy the hardship imposed upon innocent holders of negotiable paper, under the English construction of the rule that usurious instruments are absolutely void, the statute of 58 Geo. 3, c. 93, was passed, declaring that no bill or note should be invalidated in the hands of a holder for value without notice. And exceptions to the same effect may be found in some of the statutes of usury in this country. (*w*)

v. Watts, 10 Mass. 121; Bridge *v.* Hubbard, 15 Mass. 92; Sauerwein *v.* Brunner, 1 Har. & G. 477; Faris *v.* King, 1 Stewart, 255; *Sewall*, J., Chadbourn *v.* Watts, 10 Mass. 121; Payne *v.* Trezevant, 2 Bay, 23; Gaillard *v.* Le Seigneur, 1 McMullan, 225; Solomons *v.* Jones, 3 Brev. 54; Townsend *v.* Bush, 1 Conn. 260. See also Shober *v.* Hauser, 4 Dev. & B. 97. It is otherwise where the statute of usury does not declare the contract void. *Story*, J., Fleckner *v.* U. S. Bank, 8 Wheat. 354; Young *v.* Berkley, 2 New Hamp. 410; Creed *v.* Stevens, 4 Whart. 223; Conkling *v.* Underhill, 3 Scam. 388; Wells *v.* Porter, 5 B. Mon. 424; McGill *v.* Ware, 4 Scam. 21; Tucker *v.* Wilamonicz, 3 Eng. (Ark.) 157. See also Turner *v.* Calvert, 12 S. & R. 46; Fenno *v.* Sayre, 3 Ala. 459.

(*t*) Lord *Kenyon* originally held that such holder would be entitled to recover. Daniel *v.* Cartony, 1 Esp. 274; Parr *v.* Eliason, 1 East, 92. In Lowes *v.* Mazzaredo, 1 Stark. 385, however, the court decided that usury on the part of a payee of a note was a bar to an action by a *bonâ fide* holder, because he could not bring himself in connection with the maker, except through the medium of usurious indorsement; and this case was approved, in Chapman *v.* Black, 2 B. & Ald. 589. But Bush *v.* Livingston, 2 Caines's Cas. 66; Foltz *v.* Mey, 1 Bay, 486; Campbell *v.* Read, Martin & Yerg. 392, decided that a note thus usuriously indorsed is valid against the maker, in the hands of a holder in good faith.

(*u*) See Lloyd *v.* Keach, 2 Conn. 175; Gaither *v.* Farmers & Mechanics Bank, 1 Pet. 44; Nichols *v.* Fearson, 7 Pet. 107, and Freeman *v.* Brittin, 2 Harrison, 191.

(*v*) Munn *v.* Commission Co. 15 Johns. 44; Collier *v.* Neville, 3 Dev. L. 30; Knights *v.* Putnam, 3 Pick. 184. See also Littell *v.* Hord, Hardin, 81.

(*w*) See Chapman *v.* Black, 2 B. &

But where the statute contains such a provision, and also provides as the penalty for usury, the deduction in an action against the debtor, of the excessive interest secured, and the indorsee takes it after it becomes due, the deduction, it is said, may be made against him. (*x*)

But if such note, or any securities for an usurious debt be given up and cancelled, on the promise of the debtor to pay the original debt, with lawful interest, this promise is valid, being founded on a good consideration. (*y*) So, also, it is true in general, that any security given in payment or discharge of an usurious security, is equally void with that: (*z*)

Ald. 589, and Hackley *v.* Sprague, 10 Wend. 113.

(*x*) Wing *v.* Duma, 24 Maine, 128.

(*y*) Barnes *v.* Hedley, 2 Taunt. 183. In this case an agreement was made between Webb and Harrie & Suthmier, by which Webb was to advance them money to purchase sugars with, from time to time, for which he was to receive five per cent. interest, and also a commission of five per cent. upon all sugars purchased. To secure the repayment of the principal, interest and commissions, certain deeds and securities were executed to Webb. Under this agreement Webb made out four successive half yearly accounts, charging according to the agreement for the money advanced; and various sums were, from time to time, paid on this account. The sugars were not purchased or procured by Webb, but by Harrie & Suthmier. in their own names. Upon the parties being informed, and realizing that this transaction was usurious, and that Webb was in danger of losing the whole of his money, Webb, in accordance with an arrangement then made, drew up fresh accounts, deducting all charges for commission, and charging five per cent. interest only, on the money actually advanced. This account was acknowledged by the debtors to be correct, and they promised to pay it, whereupon the original securities were given up, and the original agreement cancelled and burned. This action was brought upon the last account against the assignees of Harrie & Suthmier; and the court held that it was maintainable. See Wicks *v.* Gogerley, 1 Ry. & Moody, 123.

(*z*) Preston *v.* Jackson, 2 Stark. 332, was an action on a promissory note, by an indorsee against the maker. The payee was called, and testified that he had lent the defendant 100*l.*, for which he was to receive 50*l.*, by way of interest, and took his bond for 150*l.* That he afterwards lent 100*l.* more upon the same terms, and that in August, 1814, the former securities were given up, and the note sued upon, given for the interest. *Holroyd*, J., held the note void. In Pickering *v.* Banks, Forrest's Reps. 72, the defendant had given the plaintiff bills for a usurious consideration, some of which he had paid; the remainder not being discharged when they became due, the defendant gave a warrant of attorney for the balance, on which the plaintiff had entered up judgment. *Macdonald*, C. B., ordered the judgment to be set aside and the warrant of attorney to be delivered up. In Chapman *v.* Black, 2 B. & Ald. 589, a bill of exchange was in the hands of the plaintiff, which had been usuriously indorsed by a prior party. Upon being informed of this, the plaintiff procured a new bill to be accepted by the defendant, in which the usurious indorser was omitted. The present action was brought upon the last bill, and *Abbott*, C. J., delivered the opinion of the court, that the bill was void. In Bridge *v.* Hubbard, 15 Mass. 96, Blanchard & Ford, the makers of a note void for usury, being called on for payment, asked for a longer credit, which was given on condition that other security should be obtained. The note sued on was then procured, signed by the defendant, who was liable as indorser on the first note; it was made payable to T. W. Sumner, who indorsed it in blank, under which indorsement the plaintiffs claimed. The court held

But when a new and innocent party is introduced into the substituted security, the weight of authority would lead to the conclusion that such security is valid as to him. (*a*) And if the borrower allows the usurious claim to become merged in a judgment, it is then too late to take advantage of the defence of usury. (*b*) But it is also true, that if, in the bargain respecting the new security, there is an agreement to expunge or exclude, or an actual exclusion of the unlawful interest, the new security is valid. (*c*)

the note sued upon to be a mere substituted contract for the former usurious one, and void in the plaintiff's hands. See also, to the same effect, Marsh *v.* Martindale, 3 Bos. & Pul. 154, and the following American decisions: Walker *v.* Bank of Washington, 3 How. U. S. 62; Powell *v.* Waters, 8 Cow. 685; Reed *v.* Smith, 9 Cow. 647; Tuthill *v.* Davis, 20 Johns. 285; Jackson *v.* Packard, 6 Wend. 415; Steele *v.* Whipple, 21 Wend. 103; Gibson *v.* Stearns, 3 New Hamp. 185; Morcure *v.* Dermott, 13 Peters, 45; Collins *v.* Roberts, Brayt. 235; *Swift*, C. J., Scott *v.* Lewis, 2 Conn. 135; Botsford *v.* Sanford, Ib. 276; Wales *v.* Webb, 5 Conn. 154; Warren *v.* Crabtree, 1 Greenl. 167; Lowell *v.* Johnson, 14 Maine, 240; Edwards *v.* Skirving, 1 Brevard, 548; Dunning *v.* Merrill, 1 Clarke, Ch. 252; Torrey *v.* Grant, 10 Sm. & M. 89, Jackson *v.* Jones, 13 Ala. 121; Hazard *v.* Smith, 21 Verm. 123; Simpson *v.* Fullenwider, 12 Irc. L. 338.

(*a*) Ellis *v.* Warnes, Cro. Jac. 33, Yelv. 47; Powell *v.* Waters, 8 Cowen, 669; Brown *v.* Waters, 2 Maryl. Ch. Dec. 201; Aldrich *v.* Reynolds, 1 Barb. Ch. 43; Wales *v.* Webb, 5 Conn. 154. In Cuthbert *v.* Haley, 8 T. R. 390, Haley procured Plank to discount certain notes of his at a usurious rate. The plaintiffs received the notes from Plank *bonâ fide*, and the defendant being applied to by them for payment, executed to them a bond for the amount of the notes, upon which bond this action was brought. It was held that it could be maintained. Lord *Kenyon*, C. J., said, "The construction that has already been put on the statutes, has been, in a variety of instances, abundantly hard. The courts have said, and rightly so, that the innocent holders of securities given on usurious considerations must suffer for the wickedness, or rather unlawfulness, for it has been said that usury is only *malum prohibitum*, and not *malum in se*, of the original parties to the transaction. But this is an attempt to carry that doctrine much farther than any prior case, and farther than policy or the words of the act of parliament require; and if it were to succeed, it might affect most of the securities in the kingdom; for if in tracing a mortgage for a century past, it could be discovered that usury had been committed in part of the transaction, though between other parties, the consequence would be that the whole would be void. It would be a most alarming proposition to the holders of all securities. I admit that the securities themselves that are tainted with usury cannot be enforced in a court of justice, even though they be in the hands of innocent purchasers, for a valuable consideration, without notice. . . . . And therefore the plaintiffs in this case could not have maintained any action on the notes given by the defendant to Plank. But the notes were destroyed after they got into the hands of the plaintiffs, and the bond in question was given to them, they not knowing of the usury between Plank and the defendant. I admit that if one security be substituted for another, by the parties, in order to get rid of the statute against usury, the substituted as well as the original security will be void; but it is not pretended that that was the case here." *Kent*, C. J., holds similar language, in Jackson *v.* Henry, 10 Johns. 195.

(*b*) Thatcher *v.* Gammon, 12 Mass. 268; Thompson *v.* Berry, 3 Johns. Ch. 395; S. C. 17 Johns. 436. See also Jackson *v.* Henry, 10 Johns. 196; Jackson *v.* Bowen, 7 Cow. 20; Day *v.* Cummings, 19 Verm. 496, S. P.

(*c*) Wright *v.* Wheeler, 1 Camp. 165.

Some difficulty may arise in determining when the usurious character of the original security shall attach itself to the substituted security. If A. gives B. an usurious note, he may waive the defence and pay the note; and if he pays it in bank bills, these of course are good in the hands of any honest holder to whom B. transfers them. If A. happens to have a good note of C. and gives it to B. in payment, is not this equally good in the hands of B.'s indorsee? Or if A. procures for this purpose the note of C. whose note B. has expressed himself willing to accept, this note being not usurious in itself, and C. not knowing the original usury, would not this note be good in the hands of B.'s indorsee, or assignee? We should say that it was; because, we think, on principle, that no contract should be held void for usury, unless the borrower, for usury, was a party to it; or unless it is given as collateral security for a present subsisting usurious contract. (*d*) It has been said, very forcibly, if one chooses

This was an action on a bond to which usury was pleaded. A bond had been given for the loan of money with lawful interest, but the defendant also agreed to give plaintiff a salary of 50*l.* per year as a clerk in his brewery. It was not intended that the plaintiff should render any service, but the salary was a mere shift to give the plaintiff more than 5*l.* per cent. for his money. After one year's salary had been paid under the agreement, the parties agreed that it should be deducted from the principal, the original deed cancelled, and a fresh bond taken for the remaining principal and legal interest. This was done, and on the second bond the action was brought; *Lawrence*, J., said, "The act of parliament only makes void contracts whereby more than five per cent. is secured. The original contract between these parties was certainly usurious, and no action could have been maintained on the first bond; but there was nothing illegal in the last bond; it was not made to assure the performance of the first contract, nor does it secure more than five per cent. interest to the plaintiff. The parties saw they had before done wrong, they rectified the error they had committed, and substituted for an illegal contract one that was perfectly fair and legal. I see no objection to their doing that, and am therefore of opinion that the present action is maintainable." The principle of the above decision is abundantly sustained in the following American cases: DeWolf *v.* Johnson, 10 Wheat. 367; Chadbourn *v.* Watts, 10 Mass. 121; McClure *v.* Williams, 7 Verm. 210; Hammond *v.* Hopping, 13 Wend. 505; Miller *v.* Hull, 4 Denio, 104; Bank of Monroe *v.* Strong, 1 Clarke, Ch. 76; Fowler *v.* Garret, 3 J. J. Marsh. 681; Postlethwait *v.* Garret, 3 Monr. 345; Cummins *v.* Wise, 2 Hals. Ch. 73.

(*d*) In Turner *v.* Hulme, the plaintiff arrested the maker of a note to him, which was clearly void on the ground of usury. The defendant in this action represented to the plaintiff that he could not recover on the note the consideration being usurious, but the plaintiff refused to liberate the maker of the note unless the defendant would join in a note to the amount of the maker's debt, which the defendant did, and upon that note this action was brought. It was contended that the second note was tainted by the original usury. "But Lord *Kenyon*, on this being re-opened, intimated his clear opinion to the contrary; he said that Banks, when the first note had been put in writ, by Turner, against him, should have resisted and defended himself on the ground of usury; but that the consideration of that note could not be questioned in the present action, unless it could be shown

not to avail himself of the defence of usury, but to pay a usurious debt, and pay it by delegating a debtor to himself to pay this debt, it ought not to be in the power of this delegated debtor to insist upon the original defence, and avail himself of an usury by which he was not affected. (*e*) So, at least, it seems to be held in the case of an usurious mortgagee, where the land, subject to such a mortgage, is conveyed to a third party; for the grantee cannot hold his land clear of the first mortgage debt by denying the right of the mortgagee, on the ground of usury. (*f*) Indeed it would seem that none but parties or privies can take any advantage of this defence, or this defect in a contract. For while a subsequent mortgagee cannot relieve himself from this former mortgage, by showing its usurious nature, a guarantor of a debt is so far connected with the contract that he may avail himself of the defence of usury. (*g*)

that this was a colorable shift to evade the statute against usury, devised when the money was originally lent, and the first note granted." In Marchant *v.* Dodgin, 2 M. & Scott, 632, an action was brought against the defendants, acceptors of a bill of exchange, drawn by Taylor, by him indorsed to Daniel, and by Daniel to plaintiff. Taylor testified that certain other bills had been accepted by defendant, for his accommodation, and usuriously discounted by the plaintiff. One of these bills being due, the bill sued upon was accepted by the defendants, in order to enable Taylor, by its discount, to meet the former bill, which he did, and no usury was proved as to this bill. A rule for setting aside a verdict for the plaintiff, being moved for, *Tindal*, L. C. J., said, "The bill upon which the action was brought was not a continued bill, given in substitution of the former acceptance of the defendants, but was given merely for the purpose of raising money to meet the second bill." *Bosanquet*, J., said, "It does not appear from the evidence that the third bill was given in substitution of the second, so as to be affected by what passed on the discount of it." The rule was refused. In Stanley *v.* Kempton, 30 Maine, 118, Butler held three notes against Bangs, which were usurious. Bangs being called upon to pay, procured the defendant to give the note in suit, in payment of the three original notes, which were given up. The court held the last note to be a payment, and not a substitute for the other notes, and therefore valid.

(*e*) *Jackson*, J., Bridge *v.* Hubbard, 15 Mass 103; Bcarce *v.* Barstow, 9 Mass. 45.

(*f*) Green *v.* Kemp, 13 Mass. 515; Mechanics' Bank *v.* Edwards, 1 Barb. 273; Sands *v.* Church, 2 Seld. 347; See also Stoney *v.* Amer. Life Ins. Co. 11 Paige, 635.

(*g*) Huntress *v.* Patten, 20 Maine, 28; Harrison *v.* Harnel, 5 Taunt, 784; Gray's Exrs. *v.* Brown, 22 Ala. 273.

SECTION VI.

DISTINCTION BETWEEN INVALIDITY OF THE CONTRACT, AND THE PENALTY IMPOSED.

The law affects a usurious contract with two consequences, which should be discriminated. One is, the avoidance of the contract; the other is, the penalty for the breach of the law. Now the penalty is not incurred until usurious interest be in some way paid or received; although the contract may be avoided for this cause, at any time; and it is sometimes a very difficult question, at what time, or by what act, the usury is completed. (*h*) Although an original con-

(*h*) Clark *v.* Bodgley, 3 Halst. 233; Thomes *v.* Cleaves, 7 Mass. 361; Oyster *v.* Longnecker, 16 Penn. 274; Livingston *v.* Indianopolis Ins. Co. 6 Blackf. 133; Upson *v.* Austin, 4 Ala. 124; Kirkpatrick *v.* Houston, 4 Watts & S. 115; Bank of U. S. *v.* Owen, 2 Pet. 527; Hodges *v.* Lovat, Lofft's R. 51. Fisher *qui tam v.* Beasley, Doug. 235, was an action of debt, to recover the penalty for taking usurious interest. One Grindall had borrowed 100*l.* of the defendant, for which he had given a bond, for the payment of the principal and interest, at the rate of 5*l.* per cent. at the end of six months. He also paid two guineas to the defendant, as a premium, at the time when the money was advanced. At the end of the six months the 100*l.* was repaid, and 2*l.* 10*s.* for interest. This action was brought within a year after the payment of the capital and interest, but more than a year after the two guineas were paid and the money advanced, and the question was, whether the action was barred by not being brought within a year after the offence of usury was committed. The cases of Lloyd *v.* Williams, 2 Bl. 792, and Mallory *v.* Bird, cited in Cro. Eliz. 20, were referred to, for the defendant, in which latter case, it is said, "If one contracts to have twenty pounds for the loan of an hundred pounds, if he taketh nothing of the twenty pounds he is not punishable by the statute, but if he taketh anything, if but one shilling, this is an affirmance of the contract, and he shall render for the whole contract." But *Buller*, J., said, that the answer given by *Astor*, J., to that case, when it had been cited on some former occasion was, that it meant one shilling above the legal interest. Lord *Mansfield* said, "It became material, in this case, to determine when the usury was complete. One side contended, that it was so upon the payment of the premium, and I long inclined to that opinion, because it was paid *eo nomine* as above legal interest. But I am now satisfied, as we all are, that the offence was not complete till the half year's interest was received. There are two branches of the statute. Under the first, every agreement, contract, and security, for more than legal interest, is void. Therefore the bond given to the defendant in this case was void. But under the second, the penalty is incurred only by *taking*, *accepting*, and *receiving*, more than legal interest. All the authorities lean this way, both ancient and modern. In Lloyd *v.* Williams, more than legal interest had been paid at first." Maddock *qui tam v.* Hammett, 7 T. R. 184, was an action on the statute, the usury alleged being the discount of a note for 1,000*l.* But the point on which the case turned was, that, on the day when the note became due, the maker discharged it by giving another note, which included the amount due upon the first note, and a further sum advanced by the defendants, which last note was outstanding and unsatisfied at the trial of this case. *Buller*, J., at *nisi prius*, was of the opinion that usury had not been committed, no *money* having been received by the defendant, and Lord

tract for the use of money be free from the taint of usury, and consequently can be enforced, yet if usurious interest be

Kenyon, C. J., delivering the opinion of the court, upon a motion to set aside the nonsuit, said, "The objection here is, that nothing has been received by the defendants, either for interest or principal, except a paper security, which, till it has been paid, is no payment whatever, and may ultimately turn out to be worth nothing. The plaintiff says that it was given for the first note, which was given on an usurious contract; if so, the second note is also bad. But the plaintiff cannot be permitted to contend both ways; that it is good, because given in payment of the first note; and bad, because that first note for which it was given in discharge was bad. It is true that a payment, either in money or money's worth, would be sufficient; and it shall not be permitted to a party who has knowingly received any thing, *as interest*, to apply it afterwards to another account, as he finds it convenient. But here the defendants have not received anything; and therefore I am of opinion that the direction of the learned judge at the trial was right." In Pearson *v.* M'Gowran, 3 B. & Cr. 700, S. C. 5 D. & Ry. 616, the venue, in an action of debt for penalties, was laid in Middlesex, and the offence was alleged to be that usurious interest was secured to the defendant, by a bill of exchange accepted and afterwards paid by a person named Bottrill. On the trial it appeared, that the contract was made and the acceptance given in Middlesex, but that the bill was paid in London, to the holders, to whom the defendant had indorsed it. *Abbott*, C. J., delivering the opinion of the court, referred to the statute providing that any person taking, accepting, or receiving above 5*l.* per cent. interest, should forfeit the treble value of the moneys lent, and providing that the forfeiture should be sued for in the county where the offence was committed, and said (5 D. & R. 619,) "Then the only question is, what is the offence? We think it consists in taking, accepting, and receiving usurious interest. The corrupt contract precedes and forms no part of the taking, therefore the offence here was not committed partly in Middlesex and partly in London, and the only materiality of the contract is to show the real nature and consequent illegality of the taking. . . . . We are of opinion that the venue in this case ought to have been laid in London, and not in Middlesex." And in Simpson *qui tam v.* Warren, 15 Mass. 460, where the defendant had discounted a note for $400, at the rate of two per cent. per month, which was unpaid at the time this action for the penalties was brought, it was held that no usury had been committed. *Parker*, C. J., said, "The whole sum loaned was not paid over, but the balance after deducting the discount, so that in fact 400 dollars were never lent, as stated in the declaration, but a less sum, for which the borrower promised to pay 400 dollars, which was the principal lent and the excessive interest. The defendant has then received nothing, either principal or interest, and therefore he cannot be liable for the penalty." Wright *v.* Laing, 3 B. & Cr. 165; Stevens *v.* Lincoln, 7 Mete. 525, are to the same effect. See also Scurry *qui tam v.* Freeman, 2 B. & P. 381. But if a sum more than equal to the legal interest upon the sum substantially loaned or forborne, be received, the offence of usury is complete, whether the principal be repaid or not. In Wade *qui tam v.* Wilson, 1 East, 195, 600*l.* being due from G. to the defendant, 10 guineas were paid by G. to the defendant, by way of premium, for the defendant's forbearance for one year, and G. executed his note to the defendant for 600*l.* at 5*l.* per cent. A half year's interest of 15*l.* was afterwards received by the defendant, upon the note, and it was held that upon this payment usury was committed. Lord *Kenyon* said, "Here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *qua* interest for half a year, which made what he received upon the whole, amount to more than lawful interest for that time, upon the sum lent." *Lawrence*, J., said, "Here then, is a premium paid of ten guineas, at first, which was to run through the whole year, and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which, together with what he had before received by way of premium, amounts to more than legal interest. That immediately constituted usury." *Le Blanc*, J., said, "I am of opinion that at least one moiety of the premium is to be apportioned to the half year's interest which was received,

actually paid upon it afterwards, the penalty is incurred. (*i*)

and that the true spirit of the agreement was, that the premium was to run through the whole year, in proportion as the interest accrued, and therefore, upon the whole, I think the contract proved sustains the count, and that the usury was complete when the first half year's interest was paid." In Lloyd *qui tam* *v.* Williams, 2 W. Bl. 792, Hinchliffe borrowed 100*l.* for three months, of the defendant, which he received, and paid the defendant thereout 6*l.* 5*s.* by way of interest, in advance, and gave the defendant his note for 100*l.* payable in three months. *De Grey*, C. J., and *Blackstone*, J., a majority of the court, held that the offence of usury was consummated and completely committed on making the corrupt agreement and receiving the interest in advance. In Commonwealth *v.* Frost, 5 Mass. 53, the defendant had loaned money to Ebenezer Clough, on a note for $200, in ninety days, paying him $187, having retained $13 for the ninety days' interest. At the expiration of the term another note for the same amount was given, Clough paying fourteen dollars in cash, for the extension of the time ninety days longer. This note was also renewed for ninety days, and sixteen dollars paid by Clough on its renewal, for the reception of which last interest the defendant was indicted. The court said it was clear "that the taking of the sixteen dollars, as the compensation for the loan, that sum exceeding lawful interest, completed the offence of usury, whether the principal sum was ever paid or not." There has, however, been a tendency to consider, in contracts of this last nature, the money actually received by the borrower as the amount of the loan; and although the securities given are for an amount sufficiently more than the sum received, to make the contract usurious, if the legal per cent. of interest is paid thereon, not to consider the offence of usury complete until a payment of such interest is made. This was the view *Gould*, J., was inclined to take, in Lloyd *v.* Williams, *supra;* and in Scurry *v.* Freeman, 2 B. & P. 381, in which the defendant lent Robert Hooley 500*l.* upon security given for that amount, who, a previous agreement having been made that something more than legal interest should be paid, but no particular sum having been agreed upon, offered the defendant back 50*l.* which he directed to be given to his son, the court (consisting of *Heath*, *Rooke*, and *Chambre*, judges) were very clearly of opinion that the receipt afterwards of 25*l.*, as one year's interest upon the debt, was usurious, so that an action under the statute within one year after its reception would lie, inasmuch as the loan could only be deemed a loan of 450*l.*, since the defendant had taken back 50*l.* out of the 500*l.* So also *Gibson*, C, J., in Oyster *v.* Longnecker, 16 Penn. 274, says, there is a distinction between interest and a bonus; and that a return of part of the sum on which interest is reserved, reduces the contract essentially to a loan of the residue, and that therefore the offence of usury is not committed until interest has actually been paid upon the sum reserved as the debt. But the better opinion would seem to be that such agreements are usurious whenever more than the legal interest on what is understood by the parties as the principal debt, is paid, since the statute of Anne declares it shall be usury to receive more than five pounds per cent. for forbearing or *giving day of payment;* so that, as Mr. Justice *Blackstone* remarked in Lloyd *v.* Williams, "interest may as lawfully be received beforehand for *forbearing*, as after the term is expired, for *having forborne;*" and if in either case more than five per cent. is taken, usury is committed. See remarks of *Bayley*, J., in Wood *v.* Grimwood, 10 B. & Cr. 699.

(*i*) Gardner *v.* Flagg, 8 Mass. 101; Thompson *v.* Woodbridge, Ib. 256; *Sewall*, J., Chadbourn *v.* Watts, 10 Mass. 124. In Sir Wollaston Dixie's case, 1 Leon. 95, *Gent*, B., said, "If I lend one a hundred pounds without any contract for interest, and afterwards, at the end of a year, he gives me 20*l.* for the loan thereof, the same is within the statute, for my acceptance makes the offence without any bargain or contract." In Floyer *v.* Edwards, Cowp. 114, Lord *Mansfield* said, "In case the argument originally for the payment of principal be legal, and the interest does not exceed the legal rate, but afterwards, upon payment being forborne, illegal interest is demanded, there the agreement, by retrospect, is not void, but the parties are liable to the penalty of treble value." See also Radley *v.* Manning, 3 Keb. 142, pl. 13; Lord *Mansfield*, in Abrahams *v.* Bunn, 4 Burr. 2253, and previous note.

And if the usurious interest is payable at intervals, the penalty is incurred by the first payment and receipt; (*j*) but it would seem that no more than one penalty can be incurred upon the same loan, although further instalments continue to be paid. (*k*)

Where the statute makes a usurious contract void, or forfeits a part of the principal or legal interest, by way of penalty,

(*j*) Wade *v.* Wilson, 1 East, 195; Wood *v.* Grimwood, 10 B. & Cr. 689.

(*k*) In Wood *v.* Grimwood, 10 B. & Cr. 696, in which a bonus had been paid, and afterwards a half year's interest, which together with the bonus paid constituted more than the lawful interest, and subsequently legal interest was paid half yearly, on the original debt, it was decided that the offence of usury was complete when the first half yearly payment was made; that the bonus was not to be apportioned throughout the whole time of the loan. So that an action brought for penalties, at any time within one year after the payment of any half year's interest, could be maintained, as being in time. And it was doubted whether, even if such bonus was apportionable, the only offence for which the lender could be prosecuted had not been committed upon the reception of the first half year's interest. *Parke*, J., said, "I am of opinion that the moment one penalty was incurred, upon one bargain or loan, no other offence could be committed in respect of the same bargain or loan, by reason of the lender having received a further sum, by way of usurious interest. The statute of 12 Anne, st. 2, c. 16, enacts, 'That all persons who shall, upon any contract, take, accept, and receive, by way or means of any corrupt bargain, loan, &c., for the forbearing or giving day of payment for one whole year, of or for their money, above the sum of 5*l.* for the forbearing of 100*l.* a year, and so after that rate, shall forfeit and lose, for every such offence, the treble value of the moneys lent,' &c. The statute therefore requires two things to constitute the offence; a corrupt bargain, and an actual taking of a higher rate of interest than 5 per cent. for forbearing or giving day of payment for one whole year. As soon as these two things concur, the offence contemplated by the statute is completed. The party who has received the usurious interest in respect of the corrupt bargain, then incurs the penalty, and I think *the only* penalty, attached by the statute to that corrupt bargain, and the receipt of usurious interest thereon, by forfeiting treble the value of the moneys lent or forborne. If it were otherwise, and each subsequent payment of the legal interest should constitute a distinct offence of usury, where a premium has been given, the consequence would be, that if a party took legal interest for such a loan, at intervals, he would be liable to forfeit treble the amount of the moneys lent, not merely once, but each time he received the interest; and if those intervals were short, penalties to the amount of many thousands might be incurred by a loan of a single 100*l.* This never could have been the intention of the legislature. I think it must have meant that no more than three times the amount of the money lent could ever be forfeited by the offender." But in Lamb *v.* Lindsey, 4 Watts & Serg. 449, this question was directly decided in an opposite way. Money was loaned at usurious interest, the device of the sale of property and a lease back, being adopted, to disguise the transaction. The rent, amounting to 15 per cent. upon the money loaned, was regularly paid, and the present *qui tam* action was brought, more than a year from the first payment, and within a year from the last. A majority of the court held the action maintainable, deciding that the penalty of a forfeiture of "the money and other things lent," was incurred at each time when the lender received more than the legal interest. Mr. Justice *Kennedy*, however, delivered a dissenting opinion, in which he vindicates his own opposite ruling at *nisi prius*, and adopts the same view taken by Mr. Justice *Parke*, *supra*, although the case of Wood *v.* Grimwood was not cited in the case.

the creditor of course must lose this, for the debtor may interpose this defence, however inequitable it may be. But if the debtor make himself a plaintiff, and seek relief against a contract for its usury, it is held, in equity, that he must pay or tender the whole amount of principal and legal interest. (*l*) It was once an established rule that there is no way in which the debtor can ask relief at law, except collaterally. He must wait until he is sued, before he can raise directly the question of his right to this defence, and then this defence is given and measured by the statute. But if he, for example, brings trover for goods pledged, to secure a debt for which a note with usurious interest was given, and seeks to get the value of his goods without deducting his debt, on the ground that the note is void, it might be said to him, on high authority, that the note may be void, but that is not now the question; for he owes money, and has pledged goods, and must pay his debt to redeem them. (*ll*) But this doctrine has been attacked, and perhaps overthrown in England, and may be doubted here. (*m*) So, if he has paid money on a usurious

(*l*) Scott *v.* Nesbit, 2 Browns. Ch. 642, S. C. 2 Cox, 183; *Ex parte* Skip, 2 Ves. 489; Banfield *v.* Solomons, 9 Ves. 84; Rogers *v.* Rathbun, 1 Johns. Ch. R. 367; Tupper *v.* Powell, Ibid. 439; Fanning *v.* Dunham, 5 Johns. Ch. 122; Fulton Bank *v.* Beach, 1 Paige, 429; Morgan *v.* Schermerhorn, Ibid. 544; Mc Daniels *v.* Barnum, 5 Verm. 292; Jordan *v.* Trumbo, 6 Gill & Johns. 103; Thomas *v.* Mason, 8 Gill, 1; Anonymous, 2 Des. 333; Stone *v.* Ware, 6 Munf. 541; Shelton *v.* Gill, 11 Ohio, 417; McDaniels *v.* Barnum, 5 Verm. 279; Day *v.* Cummings, 19 Verm. 496; Ballinger *v.* Edwards, 4 Ire. Eq. 449; Phelps *v.* Pierson, 1 Iowa, 121; Wilson *v.* Hardesty, 1 Maryl. Ch. Dec. 66. In Hindle *v.* O'Brien, 1 Taunt. 413, the defendant had given the plaintiff, for various sums borrowed of him, bills and notes with usurious premiums. The parties at length stated an usurious account, and the defendant gave new bills, and a warrant of attorney to confess judgment, and the old bills and notes were given up. Upon the defendant's failure to pay an instalment of the new bills, the plaintiff entered up judgment on the warrant of attorney and sued out execution. Upon an application to set aside the judgment, the court did so only upon the terms that the defendant should repay the principal and legal interest due, which was ordered to be ascertained by a prothonotary. But in Roberts *v.* Goff, 4 B. & Ald. 92, upon an application to set aside a judgment obtained under a warrant of attorney, and to have the warrant of attorney delivered up, on the ground of usury, the court refused to impose the terms that the party should pay the money actually advanced, with legal interest. *Bayley*, J., said, "We cannot impose such terms. The instrument is void. It is not good at law." Under the construction put upon the Virginia statute of usury, it seems that the debtor need only pay the principal debt, without any interest. Young *v.* Scott, 4 Rand. 415; Clarkson's Admr. *v.* Garland, 1 Leigh, 147; Turpin *v.* Povall, 8 Leigh, 93; Marks *v.* Morris, 4 Hen. & Munf. 463. See also Boone *v.* Poindexter, 12 Sm. &. M. 640.

(*ll*) Fitzroy *v.* Gwillim, T. R. 153.

(*m*) Tregoning *v.* Attenborough, 7 Bing. 97, 4 Moore & P. 722; Hargreaves *v.* Hutchinson, 2 A. & E. 12; Ramsdell *v.* Morgan, 16 Wend. 574.

contract, and sues for its repayment, it seems that he will recover so much as he has paid usuriously, (*mm*) but no more; that is, he will not recover the legal interest, which he has paid on an usurious contract. Courts were at first inclined to deny the right of a party paying usurious interest, to recover back any portion of the money so paid, on the ground that both parties to such a transaction were *in pari delicto*, and the party paying the money parted with it freely, so that the maxim *volenti non fit injuria* would apply. (*n*) But this is not so now, the rule being that above stated; and the distinction has been taken between statutes enacted on general grounds of policy and public expediency, in which each party violating the law is *in pari delicto*, and entitled to no assistance from a court of justice, and those laws enacted to protect weak or necessitous men from being overreached, defrauded, or oppressed, in which event the injured party may have relief extended to him, and the whole purport and reason, both of the law of usury, and of the great mass of decisions under it, indicate that the lender on usury is regarded as the oppressor and the criminal, and the borrower as the oppressed and injured. (*o*)

SECTION VII.

OF CONTRACTS ACCIDENTALLY USURIOUS.

If a contract is accidentally usurious, that is, made so by some mistake in calculation, or other error in fact, against the intention of the parties, the mistake may be corrected, and the contract saved. (*p*) But if, in fact, a greater rate of in-

(*mm*) Bosanquet *v.* Dashwood, Cases Temp. Talbot, 38, per Lord *Mansfield;* Browning *v.* Morris, Cowp. 793.

(*n*) Tomkins *v.* Bernet, 1 Salkeld, 22.

(*o*) Clark *v.* Shee, Cowp. 197; Browning *v.* Morris, Cowp. 790; Bosanquet *v.* Dashwood, Cases Temp. Talbot, 38; Wheaton *v.* Hibbard, 20 Johns. 292; *Beardsley*, C. J., Schroeppel *v.* Corning, 5 Denio, 240.

(*p*) Anonymous, 1 Freem. 253, pl. 268, It was said, by *North*, C. J., that "if a scrivener, in making a mortgage, &c., do, through mistake, make the money payable sooner than it ought to be, or reserve more interest than ought to be, this will not make it void within the statute, because here was no corrupt agreement." See also Nevison *v.* Whitley, Cro. Car. 501; S. C. W. Jones, 396; and Buckley *v.* Guildbank, Cro. Jac. 678. Glasfurd *v.* Laing, 1 Camp. 149, was an action on a bill of exchange for 3,180*l.*, the defendants resisted the action, on the ground of usury, and showed that the parties for whom

terest is taken than the law allows, by reason of an erroneous opinion of the lender that he had a right to this interest, this is a mistake of law, and agreeably to the general rule, will not excuse the lender, and the whole effect of usury will attach to the contract. (*q*)

The question has been very much discussed, whether banks, or other money-lenders, or bill or note discounters, have a legal right to adopt, as a principle of calculation, the rule

the defendants accepted, being indebted to the plaintiff in St. Kitts, for 6,000*l.*, with 6 per cent. legal interest there, agreed with the plaintiff in England, that the principal should be paid by two bills of exchange, one in twelve months and the other in two years; and accordingly the present bill for 3,180*l.* and another for 3,360*l.* were drawn, but that, according to the legal rate of 5 per cent. interest in England, the bills should have been for only 3,150*l.* and 3,300*l.* The plaintiff's agent, however, swore that the increased amount arose from an oversight of his; that having been called upon to calculate the sum due on the debt, for which the bills were to be drawn, after calculating the amount due on the original debt at 6*l.* per cent., as permitted in the West Indies, he inadvertently calculated the interest to grow due in England at the same rate. Sir *James Mansfield*, C. J., held that the action might clearly be maintained for the sum *bonâ fide* due, as the excess in the amount of the bill had arisen from a mere mistake, and no intention to take usury could, at any rate, be imputed to the plaintiff. See also Gibson *v.* Stearns, 3 N. H. 185; Livingston *v.* Bird, 1 Root, 303; *M'Lean*, J., Lloyd *v.* Scott, 4 Pet. 224.

(*q*) Marsh *v.* Martindale, 3 Bos. & P. 154; Maine Bank *v.* Butts, 9 Mass. 49. This was an action brought by the bank, to recover possession of certain premises mortgaged to them by the defendant, to secure several notes given by him to the bank. The defendant alleged that on the date of mortgage deed, the plaintiff loaned him $10,000, and that it was agreed between them that more than 6 per cent. interest should be paid upon the loan, and that the notes secured by the mortgage were given to secure such principal and illegal interest, and therefore he pleaded the statute of usury. It appeared upon the trial that there had been a forbearance of 10,000 dollars by the bank, and that the interest secured in the mortgage was more than 6 per cent. upon the 10,000 dollars; but it was proved that the excess had arisen, not from a direct reception by the bank of more than 6 per cent. upon any notes, but by reason of the defendant's having, in order to meet notes for 63 days, at the times they became due, procured new loans, a week previous to the expiration of the time of credit given for the former lands, giving new notes therefor; and it was contended that although the money thus received amounted to more than 6 per cent. upon the original debt, for the reason that the bank retained the amount of the new notes until the old notes became due, for the purpose of meeting them, yet that as no more than the usual profits upon loans made on banking principles were received, such agreements were not usurious. But the court decided that no banking company, any more than an individual, had authority to make a discount or loan, at a greater profit than 6 per cent. interest, nor was exempt from the restrictions of the statute against usury. And *Sewall*, J., said, "It is probable that in this case there was no intentional deviations on the part of the bank; but a mistake of their rights. This, however, is a consideration, which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved; but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect, to a certain extent. This was therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse." See also Childer *v.* Deane, 4 Rand. 406.

that gives rather more than legal interest upon notes discounted, or to which the interest is added, in case of fractional portions of years and months. Rowlett's Tables, which are calculated mainly on the supposition that a year consists of 360 days, gives this advantage to the lender. The use of these tables, or of a similar principle of calculation, is very general, not to say universal. And although this practice is, strictly speaking, usurious, and there is much conflict in the authorities, we have no doubt that the prevailing rule of law sanctions this practice, where it is adopted, merely as a convenience, and in conformity to usage. (*r*)

(*r*) In New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678, a note for 90 days, indorsed by the defendants, was the cause of action; it was given for two others, which in turn were a renewal of others. Some of the previous notes had been payable at 90 days, and all the notes had been discounted by the plaintiffs, at 7 per cent., and the discount deducted in advance. The secretary of the company testified that his practice had been to cast interest, considering 30 days the twelfth of a year, 60 days the sixth, and 90 days the fourth of a year, and to cast interest at 7 per cent. (the lawful rate) accordingly. The three days of grace he called one tenth of a month. The question was whether the note sued upon was usurious, and it was decided to be so. The court say, "It must be conceded that more than seven per cent. per annum, was received upon the discount of the note, in this case. How is the presumption of law, that it was received in pursuance of a corrupt agreement, sought to be repelled? Not by showing that the sum paid for interest was greater than the parties intended should be paid; that there was a mistake in telling the money; or that the clerk who cast the interest, had fallen into an arithmetical error; but by showing that the excess arose from the adoption of a principle of calculation, which the parties knew would give more than seven per cent., though they believed it was not a violation of the statute. In other words, the plaintiffs received more than seven per cent., because they believed that they had a legal right to receive more. If they judged erroneously, it was a mistake in point of law, and not in point of fact; and unless there be something in the case of usury to distinguish it from all other cases, their ignorance or mistake in relation to the law, can afford them no protection;" and after examining the cases upon the subject the court concluded that the mistake of the parties did not prevent the contract from being usurious, as matter of law, and its consequences from resulting." The same view is taken in Utica Insurance Co. *v.* Tillman, 1 Wend. 555; Bank of Utica *v.* Wagar, 8 Cow. 398; State Bank *v.* Cowan, 8 Leigh, 253. On the other hand, see Lyon *v.* State Bank, 1 Stewart, 442; Planters Bank *v.* Snodgrass, 4 How. (Miss.) 573; Duvall *v.* Farmers Bank, 7 Gill & Johns. 44; Duncan *v.* Maryland Savings Institution, 10 G. & J. 299; Bank of St. Albans, 1 Verm. 426; Agricultural Bank *v.* Bissell, 12 Pick. 586. In this last case the cashier of the bank took $21 as the interest of $200 for sixty-three days. *Shaw*, C. J., said, "That this sum a little exceeds 6 per cent. for one year, as fixed by statute, is very obvious. If this were done with design, and with the intent of taking more than the lawful interest, or if done in pursuance of the adoption of a principle of computation, which would give more than the legal rate, we are not prepared to say that it would not be usurious, however small the excess over the legal rate. But, as the statute prescribes the rate of interest for *one year*, and so at the same rate, for a longer or shorter time, it is obvious, that when the interest is to be computed in days or months, it is impossible to follow the prescribed rule precisely, without taking the fraction of a day; and that this is not required, is now settled by the whole current of authorities. From the impossibi-

SECTION VIII.

OF DISCOUNT OF NOTES AND BILLS.

The practice of discounting bills or notes by deducting from their face the interest for the whole time they had to run, began with our banks, and was soon so firmly established, that it was sanctioned by the courts, almost of necessity. But this practice is, in itself, certainly usurious, for the borrower has the use of the amount of the note, minus the interest, and pays interest for the whole amount. Having been sanctioned in respect to corporations whose business it was to lend money, a distinction could not be made against individuals who lent money; and it may now be considered as settled, rather for the sake of convenience than upon principle, that it is not usurious to take the interest in advance, by way of discount, although it is obvious, that by carrying this principle far enough, any amount of excessive interest may be taken. Thus, if the legal interest were six per cent., and a note for a thousand dollars had ten years to run, the borrower would receive four hundred dollars, and at the end of ten

lity of executing the statute with literal exactness, has resulted the necessity of resorting to an execution *cy pres*, in many cases, where it is intended to conform to the intent and spirit of the statute. So it has been the practice to consider a contract for money payable in months, to be payable in calendar months, and to consider a calendar month as the twelfth part of a year, and compute interest accordingly, though they are of different lengths. A note given in February, at two months, will have 57 days to run, and pay one per cent. interest, as for the sixth part of a year; but a note given in December, at two months, will have 62 days to run, and pay the same rate of interest. The same difficulty arises, in computing interest for a small number of days; and therefore some approximation, which can be made by an easy and practicable mode of computation, if made in good faith and without being intended as a cover for usury, has been considered allowable, without drawing after it the penalty of the statute. Such being the universal practice, of other persons as well as banks, we think a jury would not be warranted, from the mere fact that the interest thus computed slightly exceeds the legal rate, to infer a corrupt and usurious agreement. And we think the present case comes within this rule. The intent was, to compute and receive the interest for 60 days and grace. The grace is a regular portion of the time the note has to run, and the bank had a right to compute and receive interest for it. The period of sixty days, is one sixth of a year, as nearly as can be computed without a fraction; and three days is the nearest approximation to the 10th part of a month, or the 120th part of a year, without fractions of a day. Upon this view of the case, we are of opinion, that it is not shown that usurious interest was taken, contrary to the provisions of the statute, and that the defence is not sustained."

years, pay six hundred for the use of it, or sixty dollars a year for the use of four hundred, which is obviously much more than even compound interest. There seems, however, to be a strong disposition to limit this practice to short paper, or at least not to apply it to long loans or discounts, although nothing like a fixed rule or standard can be found, either in the authorities or in the usage, and it must often be difficult to apply such a distinction. (*s*) It seems originally to have been doubted whether the receipt of interest quarterly or semi-annually was not usurious, on the ground that the lender received thereby more than the legal rate *by the year*. And for a considerable time these contracts were considered usurious, upon which the legal interest was deducted from the sum loaned, or paid in advance. (*t*) But the practice is now universal, both in England and in this country. The authorities, however, which sustain this departure from the accurate enforcement of the usury laws, seem mainly to rest upon the principle that the additional sum received by the lender may be considered in the nature of a compensation for his services and trouble. And all the decisions show that such anticipated reception of interest must be confined to cases where a bill or note is given by the borrower, and does not extend to any ordinary private agreement of loan. (*u*)

(*s*) See Barnes *v.* Worlich, Cro. Jac. 25, S. C. Yelverton, 31, and Grysill *v.* Whichcott, Cro. Charles, 283; Caliot *v.* Walker, 2 Anstruther, 496; Eaton *v.* Bell, 5 Bar. & Ald. 40; Mowry *v.* Bishop, 5 Paige, 98.

(*t*) In Anonymous, Noy, 171, usury was pleaded to an action upon a bond. *Popham*, J., said, "If a man lend 100*l.* for a year, and to have 10*l.* for the use of it, if the obligor pays the 10*l.* twenty days before it is due, that does not make the obligation void, because it was not corrupt. But if upon making the obligation it had been agreed that the 10*l.* should have been paid within the time, that should have been usury, because he had not the 100*l.* for the whole year, when the 10*l.* was to be paid within the year. And verdict was given accordingly.

(*u*) In N. Y. Firemen Ins. Co. *v.* Ely, 2 Cow. 703, the principle extracted from the cases, by *Sutherland*, J., in which the whole court seem to have concurred, was this: "The taking of interest in advance, is allowed for the benefit of trade, although, by allowing it, more than the legal rate of interest is, in fact, taken; that being for the benefit of trade, the instrument discounted, or upon which the interest is taken in advance, must be such as *will*, and usually does, circulate or pass in the course of trade. It must, therefore, be a negotiable instrument, and payable at no very distant day; for without these qualities it will not circulate in the course of trade. Under these limitations the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious." In Marsh *v.* Martindale, 3 B. & P. 154, the defendants were acceptors of a bill of exchange for 5,000*l.*,

SECTION IX.

OF A CHARGE FOR COMPENSATION FOR SERVICE.

It is quite certain, also, that the lender, whether banker or broker, may charge, in addition to the discount, a reasonable

drawn by Robert Wood, payable in three years, to the plaintiff. It appeared that Robert Wood, having granted an annuity to the plaintiff, which he desired to redeem, and which, together with charges upon it, was worth 4,134*l.*, brought to the plaintiff the bill in question, which the plaintiff agreed to discount, and the 5,000*l.* was made up of the price of the annuity, 4,134*l.*, 116*l.* paid to the defendant in cash, and 750*l.*, three years' discount on the note. The present action was on a bond given as a substitute for the note, and the defence of usury was set up, which it was attempted to answer by considering the transaction as a discount in advance of the interest due on the 500*l.* note, which would not be usurious. The court determined that as the bill was for so long a time, coupled with its being a redemption of the annuity, it was evident that the transaction was not a discount in the way of trade, but a loan of money, a method of obtaining more than legal interest, which was corrupt in law, whatever the intention of the parties might have been. Lord *Alvanley*, C. J., said, "It is also contended, that at all events the negotiation of the bill of exchange was a transaction in the usual mode, in which all persons possessed of bills of exchange have been permitted to discount them; in which cases the interest is always deducted from the money advanced. It certainly has been determined that such a transaction on a bill of exchange, in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five *per cent.* be taken upon the money actually advanced. In such cases the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed; and unless that indulgence were allowed, it might not be worth while for any merchant to discount a bill. If, therefore, nothing more has been done in this case than what always has been done by way of accommodation among merchants, the transaction was not usurious; but the rule must be confined strictly to that sort of transaction; for if discount be taken upon an advance of money without the negotiation of a bill of exchange, it will amount to usury, as appears clearly from the cases which were cited in the argument. We must, therefore, consider what was the real transaction between the parties." In Lloyd *qui tam v.* Williams, 2 W. Bl. 792, where Hinchliffe borrowed 100*l.* of the defendant, and immediately paid him thereout 6*l.* 5*s.* advance interest, and gave his note for 100*l.* payable in three months, *De Grey*, Ch. J., and *Blackstone*, J., inclined to think that the offence was consummated and completely committed, on making the corrupt agreement, and receiving the interest by advance; and that it was not to be considered as merely a loan of 93*l.* 15*s.* The statute 12 *Anne* is express, that it is usury to take above five per cent. for the forbearing or giving day of payment, which plainly has respect to a taking of the interest, or forbearance, before the principal sum is due. And *Blackstone* conceived, that interest may as lawfully be received beforehand, for forbearing, as, after the term is expired, for having forborne. And it shall not be reckoned as merely a loan of the balance. For, if upon discounting a 100*l.* note at five per cent. he should be construed to lend only 95*l.* then, at the end of the time, he would receive 5*l.* interest, for the loan of 95*l.* principal, which is above the legal rate." In Floyer *v.* Edwards, Cowp. 116, Lord *Mansfield* said, in reference to the general practice of trade to stipulate for a certain per cent. upon a neglect to pay the price of goods bought, "It is true the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury. But it goes a great way to explain a transac-

sum for his trouble or services. (*v*) And this principle is not confined to bankers and brokers, but is extended to all cases in which there may be such services as are fairly entitled to com-

tion; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the banks, in discounting bills, exceeds the rate of five per cent.; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, viz., by deducting the interest first; yet this is not usury. In Maine Bank *v.* Butts, 9 Mass. 54, referred to above, in which it was decided that banks had no more right than individuals to receive more than six per cent. legal interest, and that the 'banking privileges,' given by the legislature, did not confer such a power, the court said, "That expression, if it has any peculiar meaning, is an authority to deduct the interest at the commencement of loans or to make loans upon discounts, instead of the ordinary forms of security for an accruing interest. But individuals have a like authority, although in both cases the construction is a relaxation of the prohibitions of the statute against usury, and allows a rate of interest, which may be estimated at a small extent beyond six per cent. per annum. Banks, in their discounts, never venture to exceed that rate, in the deductions which they make from their loans, although this anticipation of interest, in effect, gives more than the fixed rate upon the sum actually paid out." In Flecknur *v.* U. S. Bank, 8 Wheat. 354, the court say upon this question, "The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended, that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is, the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few if any charters contain an express provision, authorizing, in terms, the deduction of the interest in advance, upon making loans or discounts. It has always been supposed that an authority to discount, or to make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance, by bankers, upon loans, in the ordinary course of business, is not usurious." See also to the same effect as the foregoing cases: Manhattan Co. *v.* Osgood, 15 Johns. 164; Bank of Utica *v.* Phillips, 3 Wend. 408; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Bank of Utica *v.* Wager, 2 Cow. 712; Stribling *v.* Bank of the Valley, 5 Rand. 132; Thornton *v.* Bank of Washington, 3 Pet. 36; State Bank *v.* Hunter, 1 Dev. L. 100; Cole *v.* Lockhart, 2 Cart. (Ind.) 631; McGill *v.* Ware, 4 Scam. 21; Ticonic Bank *v.* Johns, 31 Maine, 414; Sessions *v.* Richmond, 1 Rhode Island, 305; Haas *v.* Flint, 8 Blackf. 67; Duncan *v.* Maryland Savings Institution, 10 Gill & Johns. 311. See also Hoyt *v.* Bridgewater Co. 2 Hals. Ch. 253, 625.

(*v*) Auriol *v.* Thomas, 2 T. R. 52. Winch *qui tam v.* Fenn, cited 2 T. R. 52; Caliot *v.* Walker, 2 Anstruther, 496; *Rooke*, J., Hammett *v.* Yea, 1 B. & P. 156; Masterman *v.* Cowrie, 3 Camp. 488; *Ex parte* Jones, 17 Ves. 332; *Ex parte* Henson, 1 Maddock, 115; *Ex parte* Gwyn, 2 Dea. & Ch. 12; Gibson *v.* Livesey, cited 4 M. & Sel. 196; Kent *v.* Phelps, 2 Day, 483; Hutchinson *v.* Hosmer, 2 Conn. 341; Hall *v.* Daggett, 6 Cowen, 657; Nourse *v.* Prime, 7 Johns. Ch. 69; Trotter *v.* Curtis, 19 Johns. 160; Suydam *v.* Westfall, 4 Hill. 211; Suydam *v.* Bartle, 10 Paige, 94; Bullock *v.* Boyd, 1 Hoffman's Ch., 294; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Seymour *v.* Marvin, 11 Barb. 80; M'Kesson *v.* M'Dowell, 4 Dev. &

pensation, although the lender be neither banker nor broker, nor engaged in trade, and lends his own money. (*w*) But it seems that the sum paid as a compensation or commission for service or trouble in any case, must not exceed the amount usually taken in the course of trade in that business; and if it do, such excess will make the contract usurious. (*x*) If there be such charge it will be a question for the jury, whether it is in fact a reasonable compensation for services rendered, or a mere pretence for obtaining usurious interest; (*y*) in

Battles, 120; Rowland *v.* Bull's Exrs., 5 B. Mon. 147; Brown *v.* Harrison, 17 Ala., 774. See also *Ex parte* Patrick, 1 Montagu & Ayrton, 385; Harris *v.* Boston, 2 Camp. 348.

(*w*) *Ex parte* Gwyn, 2 Deacon & Chitty, 12. And in Palmer *v.* Baker, 1 Maule & Sel. 56, where a right to purchase certain timber then standing on the land of the vendor, was assigned by the vendee, to secure a debt due from him, under which agreement the assignees were to take upon themselves the getting out and working of the timber, and after paying themselves the amount due them, with interest thereon, and after deducting "the further sum of 200*l.*, as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expenses, which they should or might expend, be put to, or be liable for, on account of the premises, or in anywise relating thereto," were to repay the same to their assignor; the court refused to nonsuit the plaintiff in the present suit, brought by the assignees, against the sheriff, who had seized a portion of the timber as the property of the assignor, and decided that, as the jury had not found that the compensation was colorable, or excessive, the court could not say that the contract was usurious, since the compensation must therefore be taken to be a reasonable one, for the services performed and the trouble incurred. In Baynes *v.* Fry, 15 Ves. 120, a claim was made upon certain property, for commission money. The party claiming the commission, having advanced money at 5 per cent. interest, took bills upon Hamburg, which bills he sent there for the purpose of obtaining their amount, and upon this transaction the commission was claimed, which claim was objected to because it was usurious. Lord Chancellor *Eldon* said: "The first case upon this point was that upon the circuit, in 1786, Benson *v.* Parry, where Lord Chief Justice, then Baron, *Eyre*, held that a country banker, discounting bills payable in *London*, could not take a commission, but that was set right upon an application to the court. I take the facts of this case, as far as I can understand them from the accounts that have been handed up, to stand thus: Hanson advanced money to these parties, upon the terms of receiving interest; desiring them, if they had bills upon *Hamburg*, to put them into his hands, for the purpose of sending them there, to procure acceptance and payment; in order to bring himself home, taking a reasonable commission for his trouble in doing so. That, according to modern doctrine, is not usurious."

(*x*) In Harris *v.* Boston, 2 Camp. 348, the plaintiffs were seed factors, and bought large quantities of rape seed for the defendant, advancing money thereupon, for which they charged the legal interest; and it was also agreed that they should have a commission of 2½ per cent. upon all the seed purchased. Upon an action to recover an amount due under this contract, to which usury was pleaded, many witnesses swore that the highest commission they had ever known taken upon such purchases, was one shilling a quarter, which, at the current price of rape seed, amounted to exactly one per cent. Lord *Ellenborough* said, "If the plaintiffs would have duly made the purchases for one per cent., but charge 2½, besides legal interest, where they advance the money, this commission must be considered an expedient for enhancing the rate of interest beyond 5 per cent., and is a mere color for usury."

(*y*) Kent *v.* Phelps, 2 Day, 483; Hut-

which case, of course, it will not be allowed. The party drawing a bill may also charge a sum, in addition to legal interest, as the rate of exchange between the place where the loan is actually advanced and the place where it is to be repaid; provided such charge is the customary rate, and therefore not a device to cover usury. (z) So if the acceptor of a bill pays it before it is due, it is held that he may deduct

chinson *v.* Hosmer, 2 Conn. 341; De Forest *v.* Strong, 8 Conn. 519; M'Kesson *v.* M'Dowell, 4 Dev. & B. 120; Bartlett *v.* Williams, 1 Pick. 294; Stevens *v.* Davis, 3 Met. 211; Brown *v.* Harrison, 17 Ala. 774. In Carstairs *v.* Stein, 4 M. & Sel. 192, the defendants allowed Kensington & Co. to draw upon them, for an amount not exceeding 20,000*l.* at any one time, and were to receive a commission of one half per cent. upon the amount of the bills drawn. In this action, brought by the assignees of Kensington & Co., for balances alleged to be due, the defence of usury was alleged, and evidence was offered to show that the commission of one half per cent. was unreasonable, and more than the accustomed rate. Lord *Ellenborough* directed the jury, that if the commission could be fairly set to the account of trouble and inconvenience, it was not usurious; otherwise if the commission overstepped the *bonâ fide* trouble, and was mixed with an advance of money, in order to effect an inducement for such advance, from time to time, and his Lordship inclined to consider the transaction, under the circumstances, usurious, but left it to the jury, who found otherwise for the plaintiff. Upon a motion for a new trial the court refused to disturb the verdict. Lord *Ellenborough*, C. J., said, "The principal question has been, whether the one half per cent. agreed to be charged for commission, in this case, is clearly referable to an usurious contract between the parties, for the payment of interest above five per cent. upon a loan of money, or whether it may not be referred to an agreed case of remuneration, justly demandable for trouble and expense incurred, in the accepting and negotiating bills remitted to and drawn upon them, and in the doing such other business as is stated to have been done by the Kensingtons, for the houses or rather for the house of the defendants, under its different names and descriptions. . . . . All commission, where a loan of money exists, must be ascribed to and considered as an excess, beyond legal interest, unless as far as it is ascribable to trouble and expense *bonâ fide* incurred, in the course of the business transacted by the persons to whom such commission is paid; but whether anything and how much is justly ascribable to this latter account, viz, that of trouble and expense, is always a question for the jury, who must, upon a view of all the facts, exercise a sound judgment thereupon." His Lordship recapitulated here the suspicious circumstances in the case, and then said, "These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a color for usury, upon loans which were stipulated not to be required, but which were in fact required and made, from the beginning to the end of this business. But this question, i. e., whether color or not, was a question for the consideration of the jury, and to their consideration it was fully left, with a strong intimation of opinion, on the part of the judge, that the transaction was colorable, and the commission of course usurious. The jury have drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw; and they having done so, for the reasons already stated, we do not feel ourselves, as a court of law, and acting according to the rules by which courts of law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

(z) Andrews *v.* Pond, 13 Pet. 65; Buckingham *v.* McLean, 13 Howard, 152; Merritt *v.* Benson, 10 Wend. 116; Williams *v.* Hance & Mott, 7 Paige, 581; Ontario Bank *v.* Schermerhorn, 10 Paige, 110; Cuyuga County Bank *v.* Hunt, 2 Hill, 635; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Cuyler *v.* Sanford, 13 Barb. 339; Commercial Bank

a larger sum than legal interest on the amount, until the day of the maturity of the bill, without the transaction being usurious, (*a*) because, in fact, it is no loan, but a voluntary anticipation of a payment.

SECTION X.

OF A CHARGE FOR COMPENSATION FOR RISK INCURRED.

As the lender may take a compensation for his trouble and services, so he may for the risk that he runs. By this, however, is not meant the personal risk of the debtor's ability to pay; for nothing of this kind is any justification whatever of more than legal interest. But where, by the nature or the terms of the contract, the repayment of money loaned is made to depend upon the happening of contingent events, there the lender may take, beside his interest for the sum loaned, enough more to insure him against the casualty which might destroy his claim; that is, so much more as this risk of loss is worth. Nor is there any definite standard for this, like that which the statutes give for legal interest; and any contract for loan of money upon extra interest, if the principal sum were actually at risk, would probably be sanctioned by the courts, unless it amounted by its excess or its circumstances, to fraud and oppression. Upon this foundation rests a large class of mercantile contracts of universal use and great importance, known by the names of loans on bottomry and respondentia. By these contracts, money is

v. Nolan, 7 How. (Miss.) 508. See also Leavitt *v.* De Launy, 4 Coms. 364.

(*a*) Barclay *qui tam v.* Walmsley, 4 East, 55. A bill for 30*l.* was drawn on the defendant, dated July 14, 1801, and came by indorsement to Cutler. The bill was payable thirty days after date, and was presented by Cutler to the defendant, for acceptance, on the 20th August, when it was agreed that the defendant should pay the bill, then receiving an allowance of 6*d.* in the pound; and the defendant accordingly paid 29*l.* 5*s.* to Cutler, who thereupon gave him the bill. The plaintiff having been nonsuited, at the trial, before Lord *Ellenborough*, the court refused to grant a rule to set the nonsuit aside. "Lord *Ellenborough*, C. J., said, that to constitute usury there must be either a direct loan and a taking of more than legal interest for the forbearance of repayment, or there must be some device contrived for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. But here was no loan or forbearance, only a mere anticipation of the payment of a debt, by the party, before the time when by law he could be called upon for it. That the defendant had been guilty of very improper practice, but not of usury."

loaned either on a pledge of the ship, or on that of the goods on board a ship, with condition that if the ship or goods be lost nothing of the principal or interest shall be repaid, but if they arrive safe, the principal shall be repaid with more than lawful interest. (*b*) And a bottomy bond may be made

(*b*) Soome *v.* Gleen, Siderfin, 27, was debt, upon an obligation, the condition of which was, that if a certain ship should go to Surat, in the East Indies, and return safe to London, or if the owner or his goods should return safe, then the defendant should pay the plaintiff the principal money loaned, and 40*l.* for every 100*l.*; but if the ship, &c., should perish by unavoidable casualty of sea, fire, or enemies, the plaintiff should have nothing. The question whether the contract was usurious, was argued by *Earle*, for defendant, who agreed that if the condition had been solely that if the ship should return safe, this would have been a good bottomry contract, and an apparent hazard of the principal, but contended that since here the contingency was so remote, that if the owner of the ship or his goods returned it would not happen, the contract was within the statute, for otherwise the statute of usury should be of no effect. But it was replied by the counsel for the plaintiffs and resolved by the court, that this was not usury, within the statute, but a good bottomry contract. And Chief Justice *Bridgman* took a diversity between a bargain and a loan, for where there is a plain and square bargain (as here) and the principal hazarded, this cannot be within the statute of usury. But otherwise is it of a loan which is intended where the principal is not hazarded. And there are apparent dangers of the sea, fire, and enemies, between this and the East Indies, which endanger the loss of the principal. And they said that such contracts, called bottomry, tend to the increase of trade, and that on which many orphans and widows live, in the port towns of this realm. Judgment by the whole court was for the plaintiff, that this contract is not usurious. Sharpley *v.* Hurrel, Cro. Jac. 208, was debt upon an obligation. "The defendant pleaded the statute of usury; and showeth that a ship went to fish in Newfoundand, which voyage might be performed in eight months, and that the plaintiff delivered fifty pounds to the defendant, to pay sixty pounds upon return of the ship, off *Dartmouth;* and if the said ship, by occasion of leakage or tempest, should not return from Newfoundland to Dartmouth, then the defendant should pay the principal money, viz. fifty pounds, only; and if the ship never returned, he should pay nothing. And it was held by all the court, not to be usury, within the statute; for if the ship had staid at Newfoundland two or three years, he should have paid at the return of the ship but sixty pounds; and if the ship never returned, then nothing; so that the plaintiff ran a hazard of having less than the interest, which the law allows, and possibly neither principal nor interest." See also, to this effect, Earl of Chesterfield *v.* Jansen, 1 Wils. 286, 1 Atk. 342, 348, 1 Ves. Sr. 143, 148, per *Burnett*, J., and Sir *John Strange*, M. R.; Rucher *v.* Conyngham, 2 Pet. Adm. 295; the Sloop Mary, 1 Paine, Cir. C. Reps. 675; *Doderidge*, J., in Roberts *v.* Trenayne, Cro. Jac. 508; Garret *v.* Foote, Comb. 133. In Thorndike *v.* Stone, 11 Pick. 183, the plaintiff brought an action upon a penal bond, the condition of which recited a loan of $18,000, by the plaintiff, to the defendant, which sum was to run at bottomry, upon the ship Israel, at and from Boston, to and in any ports and places, during the term of three years from the date of the bond, at the interest and premium of 12 per cent. per annum; and declared that the defendant should also pay to the plaintiff, during the three years, one half of the gross earnings of the ship, which should go in discharge of the principal sum and the premium due upon it; that the defendant might make any further payments within the three years; that upon all such payments the plaintiff should thereafter bear the risk only of the amount actually due on the bond, being entitled to retain all payments made to him, whether the ship were lost or not, and the ship being pledged to the plaintiff to secure the balance due at any time; and the bond was to be void upon the defendants' performance

on time, as well as on a specific voyage. (*c*) This is often — or certainly may be — used as a means of lending money on usurious interest. If, for example, the loan is for one year, at twelve per cent., six per cent. being legal, and the lender insures the ship (which he may lawfully do) (*d*) for three per cent., he gets nine per cent. for the use of his money. Still these contracts are sanctioned by the law and usage of every mercantile country, and are protected by courts, provided the principal and interest are both put at hazard, by the very contract itself. For this is the one condition of their validity.

This same principle is applied to some land contracts; as if one buys an annuity, or rent charge, even on exorbitant terms, it is still no usury. From the authorities on this subject it may be inferred, that the grant of an annuity, at any price, for an uncertain period, either upon a purchase or a loan, is not usurious, because the lender or purchaser incurs the risk that he may never be entitled to receive the amount loaned or paid. If the transaction be, in fact and in good faith, a purchase, any contingency, however slight,

of the agreement and the payment of any sum which might be due under it, at the expiration of the three years. It appeared also that the defendant mortgaged certain real estate to the plaintiff, to secure the performance of the condition of the bond; that the plaintiff procured $10,000 insurance on the vessel for one year, at five and a half per cent., and that the defendant also insured the vessel for a certain voyage. It was contended, for the defendant, that this was not a bottomry bond, but a contract at common law, and usurious. *Putman, J.*, delivered the opinion of the court: "We are all clearly of opinion, that the objections which the defendant's counsel have made to the plaintiff's recovery, cannot prevail. It is said that this is not a bottomry bond, but a usurious contract; and the court are to determine whether it be one or the other, upon the facts which are agreed by the parties. It is argued that the payment of the money borrowed, is secured in such a manner as to make it a certainty that the plaintiff would receive his money, with twelve per cent.; that it is secured by a mortgage of real estate, as well as by a mortgage of the ship, and an assignment of half the freight and earnings for the term of the loan; and it is further objected, that the loan is upon time, and not for a voyage, as it is usually made. But the answer to these objections is, that if the ship should be lost within the time of three years, for which the money was lent, the plaintiff was to lose all the money which should be then due upon the bond. It is the essence of the contract of bottomry and respondentia, that the lender runs the marine risk, to be entitled to the marine interest. The rate of interest, and the manner of securing the payment of what may become due upon such contract, are to be regulated by the parties. Those considerations are not to be regarded by the court, excepting only to ascertain whether they were colorably put forth to evade the statute against usury. We do not perceive any thing in the facts which would warrant that conclusion. If the ship had been lost immediately after she sailed, it is perfectly clear that the plaintiff would have lost all his money."

(*c*) Thorndike *v.* Stone, 11 Pick. 183, *supra*.

(*d*) Thorndike *v.* Stone, 11 Pick. 183, *supra*.

will prevent the contract from being usurious; and even if the annuity granted by the seller be so large that a court of equity will set it aside as unconscionable, yet it is not thereby usurious. But if it appears that a loan was in fact intended between the parties, and the form of an annuity was resorted to merely as the shape or method of the loan, the contingency must now be real and substantial, and of sufficient magnitude; for if it appears to be so slight as to be merely colorable, or such that the probability of its occurrence could not have been for any material purpose within the contemplation of the parties, this shape of an annuity will not protect the transaction from the penalties of usury. (*e*)

(*e*) Roberts *v.* Tremoile, 1 Rolle, 47; Fountain *v.* Grymes, Cro. Jac. 252, S. C. 1 Bulstrode, 36; Floyer *v.* Sherard, Ambler, 18; Lloyd *v.* Scott, 4 Pet. 205; Scott *v.* Lloyd, 9 Pet. 418. In Richards *v.* Brown, Cowp. 770, Lord *Mansfield* treats an annuity upon the borrower's life, with a right, on his part, to redeem at the end of three months, as involving only the contingency of the borrower's dying within that three months; and after showing that the transaction between the parties was essentially a loan, says, "It is true, there was a contingency during the three months. It was *that* which occasioned the doubt, whether a contingency for three months is sufficient to take it out of the statute. As to that, the cases have been looked into, and from them it appears, that if the contingency is so slight as to be merely an evasion, it is deemed colorable only, and consequently not sufficient to take it out of the statute. Here the borrower was a hale young man, and therefore we are of opinion that there was no substantial risk, so as to take this case out of the statute." But it seems that where the right to redeem is optional with the seller, the purchase is not usurious, because the purchaser or lender cannot compel a repayment of his principal, and it is therefore at risk. King *v.* Drury, 2 Levinz, 7; Murray *v.* Harding, 2 Blacks. 859. See also *Bayley*, J., White *v.* White, 3 B. & Cr. 273; Chippindale *v.* Thurston, 1 M. & Mal. 411. Since the introduction of life insurance, the purchase of an annuity may be made the means of effecting a loan at more than legal interest, and that certainly secured, as the purchaser may guard against the contingency of the grantor's death, by effecting insurance on his life. *Hardwicke*, L. C., Lawley *v.* Hooper, 3 Atk. 278; *Blackstone*, J., Murray *v.* Harding, 2 Blacks. 865. And where an annuity was granted for four lives, with a covenant that the grantor, within thirty days after the expiration of the third life, should insure the principal sum upon the life of the survivor, the covenant was held not to make the transaction usurious. *In re* Naish, 7 Bing. 150. See also Morris *v.* Jones, 2 B. & Cr. 232; Holland *v.* Pelham, 575, 1 Tyr. 438. It was anciently decided that annuities for terms of years, by which it was evident that eventually more than the principal sum and legal interest would be paid, were not usurious, being merely purchases. Fuller's case, 4 Leonard, 208; Symonds *v.* Cockerill, Noy, 151; Cotterel *v.* Harrington, Brown & Golds, 180; King *v.* Drury, 2 Lev. 7; *Twisden*, J., in Rowe *v.* Bellaseys, 1 Sid. 182. But in Doe *v.* Gooch, 3 B. & Ald. 666, upon Sir James *Scarlett's* saying, that if a person have an annuity secured on a freehold estate, with a power of redemption, such power will not make the bargain usurious, *Bayley*, J., remarked, "In that case the principal is in hazard, from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received." And where an annuity was

It has been held that loans, of which the repayment is made to depend on the life of the parties, come within the same principle. (*f*) So also with regard to loans to be repaid on the death of a party, or post-obit contracts, which, even if excessive and oppressive, and on that ground avoided in equity, are, nevertheless, not usurious. (*g*)

granted for 11½ years, payable half yearly. the seller giving twenty-three promissory notes for the half yearly payments; and it appeared in evidence, that these payments would pay the purchase-money of the annuity, and interest, at nearly 12*l.* per cent. per annum; the Master of the Rolls said, "With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of 4,000*l.*, with interest, by twenty-three instalments, and as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious."

(*f*) In Burton's case, 5 Coke, 69, *Popham*, C. J., said, "If A. comes to B. to borrow 100*l.*, B. lends it him if he will give him for the loan of it for a year, 20*l.*, if the son of A. be then alive. This is usury, within the statute; for if it should be out of the statute, for the uncertainty of the life of A., the statute would be of little effect; and by the same reason that he may add one life, he may add many, and so like a mathematical line which is *divisibilis in semper divisibilia*." In accordance with this principle, Clayton's case, 5 Coke, 70, in which Reighnolds lent Clayton 30*l.* for six months, to be paid at that time 33*l.*, if Reighnold's son should be then alive, if not, to be paid 27*l.*, was decided to be usurious. Button *v.* Downham, Cro. Eliz. 643, was similarly decided; but in Bedingfield *v.* Ashley, Cro. Eliz. 741, in which Ashley, for 100*l.*, covenanted with Gower to pay to every one of Gower's five daughters, who should be alive in ten years, 80*l.*, this transaction was resolved by all the judges not to be usury; "for it is a mere casual bargain, and a great hazard, but that in ten years, all the daughters, or some of them will be dead; and if any of them be not alive, he shall save thereby 80*l.* But if it were that he should pay 400*l.* at the end of ten years, if any of them were alive, it were a greater doubt. Or if it had been that he should pay, at the end of one or two years, 300*l.*, if any of the said children were alive, that had been usury; for in probability one of them would continue alive for so short a time, but in ten years are many alterations." And in Long & Wharton's case, 3 Keble, 304, which was "Error of judgment, in debt, on obligation to pay 100*l.*, on marriage of the daughter, and if either plaintiff or defendant die before, nothing. The defendant pleads the statute of usury, and that this was for the loan of 30*l.* before delivered, to which the plaintiff demurred, and *per curiam*, this is plain bottomry, and judgment affirmed."

(*g*) The great case on the validity of *post obit* bonds, is that of Chesterfield *v.* Jansen, 1 Atkins, 301, 2 Ves. 125, 1 Wilson, 286. The defendant paid Mr. Spencer, testator of the plaintiffs, 5,000*l.*, and took from him a bond for 20,000*l.*, conditioned for the payment of 10,000*l.*, to the defendant, at or within some short time after the death of the Duchess of Marlborough, in case Mr. Spencer survived her, but not otherwise. In six years the Duchess died, and shortly after her death Mr. Spencer renewed the bond of 20,000*l.*, to the defendant, with a condition for the payment of the 10,000*l.* on the next April,—gave the defendant a warrant of attorney to confess judgment against him, and about a year after this paid 2,000*l.* on the new bond. Two years after the Duchess of Marlborough's death, Mr. Spencer died, and his executors brought this bill to be relieved against the bond to the defendant, as unreasonable and usurious, being independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty, so that by reason of the great age and infirmity of the Duchess, and her consequent approaching death, the requiring 10,000*l.* for the forbearance of 5,000, was more than legal interest. The cases upon the subject of loans, upon contingencies, *post obits*, &c., down to the time of this case, were collected and cited

SECTION XI.

CONTRACTS IN WHICH A LENDER BECOMES PARTNER.

It is often attempted to apply the same principle to the law of partnership, and to protect contracts in which money has been loaned from the imputation of usury, by the defence that the person advancing the money becomes a partner with the person receiving it, and liable as such for the debts of the partnership, and that, therefore, there is a substantial risk, which protects the transaction from being

by the able counsel employed; and Lord Chancellor *Hardwicke*, Sir *John Strange*, M. R., and Mr. Justice *Burnett*, decided that the loan to Mr. Spencer being upon a contingency, whereby the principal was *bonâ fide* hazarded, was not usurious; and although they would have relieved against the bargain as unconscionable, had it not been confirmed, they held that the execution of the new bond, by Mr. Spencer, and a part payment upon it, confirmed and ratified the agreement, so that they could not relieve. It will be noticed that in this case there was a possibility, in case Mr. Spencer should die before the Duchess, that no part of the money lent would be repaid; and therefore this case does not go to the extent of deciding that where there is a contract to pay money, at all events, upon the death of a party, such contract is good by reason of the uncertainty of the amount that will eventually be received. But in Batty *v.* Lloyd, 1 Vernon, 141, the defendant had agreed with the plaintiff, who had an estate fall to her, after the death of two old women, to give her 350*l.*, in consideration of receiving 700*l.* at the death of the two women, which money the plaintiff was to secure by a mortgage of her reversionary estate. Both the women died within two years afterwards; and the plaintiff, being sorry for her bargain, brought this bill to be relieved. Lord Keeper *North* said, "I do not see any thing ill in this bargain. I think the price was of full value, though it happened to prove well. Suppose these women had lived twenty years afterwards, could Lloyd have been relieved by any bill here? I do not believe you can show me any such precedent. What is mentioned of the plaintiff's necessities, is, as in all other cases—one that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value; so where people are constrained to sell, they must look not to have the fullest price; as in some cases that I have known, when a young lady that has had 10,000*l.* portion, payable after the death of an old man, or the like, and she in the meantime becomes marriageable, this portion has been sold for 6,000*l.*, present money, and thought a good bargain too. It is the common case; pay me double interest during my life, and you shall have the principal after my decease." In Lamego *v.* Gould, 2 Burr. 715, defendant gave plaintiff this writing, receiving therefor two guineas; "Memorandum. In consideration of two guineas, received of Aaron Lamego, Esq. &c. I promise to pay him twenty guineas, upon the decease of my present wife, Anne Gould." The question was whether it was usurious, the woman being at the time seventy years of age. The court held it no usurious loan but only a wager. Mathews *v.* Lewis, 1 Anstr. 7, was a case in which Lewis upon a loan of 1,600*l.* gave *post obits* for 3,200*l.*, payable on the death of either Lewis's mother or grandmother, from whom he was entitled to large property, and his grandmother being eighty-seven years of age. The court said, "This is nothing like usury. It is a catching bargain, an extortioning *post obit*, but no usury."

usurious, although, by the terms of the agreement, the party is to receive more than legal interest for his money.

In reference to this question it seems in general clear, that where a contract of partnership is expressly entered into by the parties, or where money is advanced and the party advancing it reserves, instead of interest, a certain proportion of the profits of a certain business, so that in the construction of law a partnership may fairly be presumed to be intended, and the contract is in neither case intended as a device to cover a usurious loan, then the contract lacks that essential element of the crime of usury, — a loan of money, — and therefore no usury is committed; although the partner advancing the money may and probably will receive more than would amount to legal interest upon it. (*h*)

And if it be clear that a partnership was *bonâ fide* intended, and that there was no contrivance to cover a loan, there is no usury, although one of the partners covenants that he will bear all the losses and pay the other, as his share of the profits, a certain sum, which amounts to more than legal interest on that other share in the capital; for here is still no loan of money. (*i*)

But where the contract is in the form or under the disguise of a partnership, a loan of money, and for its use the borrower contracts to pay legal interest, and also a certain proportion of the profits of a trade or business, this is usurious, although the lender may be made liable for the debts incurred by the borrower in the course of the trade or business, because if he is so compelled to pay he still has his remedy over against the borrower, and therefore runs no ultimate risk, except that of the borrower's insolvency, which, as we have seen, is not enough. (*j*)

(*h*) Fereday *v.* Hordern, 1 Jac. 144; Morrisset *v.* King, 2 Burr. 891.

(*i*) Enderbey *v.* Gilpin, 5 Moore, 571; S. C. in error, 1 D. & R. 570, 5 B. & Ald. 954; Fereday *v.* Hordern, 1 Jac. 144.

(*j*) Morse *v.* Wilson, 4 T. R. 353; Huston *v.* Moorhead, 7 Penn. 45.

SECTION XII.

OF SALES OF NOTES AND OTHER CHOSES IN ACTION.

It is quite settled that negotiable paper may be sold for less than its face, and the purchaser can recover its whole amount from the maker when it falls due, although he thereby gets much more than legal interest for the use of his money; and this principle is extended to bonds and other securities for money loaned.

The reason on which the rule rests is obvious. For such paper is property; and there is no more reason why one may not sell notes which he holds, at a price made low either by doubts of the solvency of the maker or by a stringency in the money market, than why he should not be able to sell his house or his horse at a less than the average price. But the purchase must be actual and made in good faith, and not merely colorable, in order to give efficacy to an usurious contract. For if the mere form of a sale was sufficient, it is obvious that the usury laws would lose all their force; for the lender need only refuse to lend at all, and propose instead to buy the note of the borrower. It is, therefore, important to discriminate between these two cases; that is, between a loan, in the form of a sale, and an actual sale and purchase. And this discrimination is very difficult; nor is it quite certain from authority, what rules govern this question. We may say that if the payee lends and the borrower gives his note for legal interest, the lender, having thus acquired the note, may afterwards sell it for the most he can get, and it is obvious that the lender takes nothing usurious; and if he loses by the second transaction, and the purchaser gains, it is a loss and gain on a purchase, and not on a loan. And both on authority and on general principles, it would seem that the first owner of the note must pay for its full amount, or else, though he may say he purchases it of the maker, in fact he only lends on his security, and that usuriously. (*k*) Again, if this be

(*k*) The following American authorities determine that where a note has been fairly executed, and there is no usury between the original parties, so that the payee has acquired a legal right to sue the maker upon the note, he may

true where the parties deal directly together, it should be equally true where they deal through an agent. And then it would follow, that if the maker, whom we may suppose to be one of our railroad corporations, issues its notes or bonds, and gives them to a broker, to raise money on them, for the use of the corporation, and the broker sells them to his customers for less than the face, or par value, such a transaction would be a loan, and an usurious loan, from those customers to the corporation. And if the paper was indorsed or assigned to any person, without consideration, and without giving any ownership of the paper to him, and only for the purpose of facilitating the raising of money, or concealing the real character of the transaction, it would still fall within the same principles, and be only a loan. It is in this way we should speak of this question, on principle; but in practice it becomes complicated and embarrassed by the further question, how far the knowledge, understanding, or intention of the party who gives the money on the paper, goes to determine whether it be a purchase or a loan. For example, if, in the last case supposed, he who advances the money becomes the first owner of the note, does this of itself make it an usurious loan to the maker, or may the advancer of the money insist upon the fact that, in point of form, he purchased the paper, and that he did not in reality know, and could not have inferred, from any of the circumstances of the case, that the party from whom he bought was not either the owner or the agent of the owner of the note, for valuable consideration. Many reasons would lead us to favor this defence; and to hold that although, if a note be

then dispose of it, at any rate of discount from its face, and the purchaser will have a right to enforce it for its full amount against the maker. Nichols *v.* Fearson, 7 Pet. 107; Moncure *v.* Dermott, 13 Pet. 345; *Jones*, Ch., Powell *v.* Waters, 8 Cow. 685; Rice *v.* Mather, 3 Wend. 65; Cram *v.* Hendricks, 7 Wend. 569; Munn *v.* Commission Co. 15 Johns. 55; Rapelye *v.* Anderson, 4 Hill, 472; Holmes *v.* William, 10 Paige, 326; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Ingalls *v.* Lee, 9 Barb. 647. *Parsons*, C. J., Churchill *v.* Suter, 4 Mass. 162; Lloyd *v.* Keach, 2 Conn. 179; Tuttle *v.* Clark, 4 Conn. 153; King *v.* Johnson, 3 McCord, 365; Musgrove *v.* Gibbs, 1 Dall. 217; Wycoff *v.* Longhead, 2 Dall. 92; French *v.* Grindle, 15 Maine, 163; Farmer *v.* Sewall, 16 Maine, 456; Lane *v.* Steward, 20 Maine, 98; Hansbrough *v.* Baylor, 2 Munf. 36; Shackleford *v.* Morriss, 1 J. J. Marsh, 497; Oldham *v.* Turner, 3 B. Mon. 67; Metcalf *v.* Pilcher, 6 B. Mon. 529; May *v.* Campbell, 7 Humph. 451; Saltmarsh *v.* Planters & Merchants Bank, 17 Ala. 768.

given upon the reception of much less than its amount, and be therefore usurious as between the first parties, it carries this taint with it into the hands of subsequent *bonâ fide* holders, yet because, in order to constitute a usurious contract of this kind a similar intent must coöperate in both parties to the loan, the fact that the maker of the note or bond and the agent to whom he delivered it to dispose of, might intend, in contemplation of law, to commit usury, would not supply the want of such intent on the part of the party intending to make a purchase, and who had no knowledge or intention of a loan. On the whole, therefore, we are inclined to give, as the prevailing rule, that where one supposes himself to be purchasing negotiable paper of an owner, and is without notice to the contrary, either actual or derivable from the circumstances of the case, this advancer of the money would have all the privilege and safety of a purchaser. (*l*) There are no authorities within our knowledge, which, upon a fair construction, go beyond this; although it may be true that some of those which we have above cited might almost justify the conclusion, that if the paper be purchased in form, the maker cannot object on the ground that it was a usurious loan. But it is not easy to recognize any principles which would go further than to extend the attributes of a purchase to any party who believed in good faith that he was a purchaser.

In speaking thus far of the sale of notes, we have had particular reference to those which were transferred by delivery or by indorsement without recourse. Another question has been raised, however, when the transfer was made by an indorsement which left the indorser liable if prior parties did not pay; and this question is, whether the transaction did not then become usurious, if the note was sold for less than its face, because the indorser would then be bound to pay a larger sum than that which he had received, with lawful interest upon it. The cases upon this subject are somewhat conflicting, but the difficulty has, we think, arisen from dis-

(*l*) This view is supported by Law's Exrs. *v.* Sutherland, 5 Gratton, 357; Whitworth *v.* Adams, 5 Rand. 333; Shackleford *v.* Morriss, 1 J. J. Marsh. 497; Hansbrough *v.* Baylor, 2 Munf. 36; Holmes *v.* Williams, 10 Paige, 326.

regarding the peculiar character of negotiable paper, and also from forgetting that the whole law of usury is, in its nature, penal, and therefore to be strictly construed. If one transfer a note by indorsement, he does two things; he transfers the note, and he also becomes liable for its payment; but the latter is incidental to the former. The substance of the transaction is a transfer of the property in the note, a sale, and nothing more than a sale; and therefore we say that the price paid has nothing to do with the question, as one of usury. But besides this, it is important to observe that such a transaction can be made usury only by a very large construction of that word; no money is loaned or borrowed, or forborne, in any way whatever; it cannot therefore be usury, within any accuracy of interpretation. We do not mean to say, of course, that actual and intended usury could be successfully covered by a mere disguise of this kind. In case of such an attempt it would be declared a usurious loan, because it would be such, and would have the effect of usury; but if it were a *bonâ fide* sale of the note, the indorsement, and the liability derived from it, would not, in our judgment, impart to the transaction a usurious character.

A further question may then be raised; if the holder sues the indorser, can he recover the face of the note, or only what he paid, with legal interest? We are of opinion that he may recover the amount upon the face of the note, from his indorser, as well as from any prior party. It is this amount he buys; it is this which he had a right to buy, and which the indorser had a right to sell, and a right to guarantee.

By some authorities it has been held that the indorsement of the note, by the nominal seller, or the giving of security in any way for its payment, in case of the failure of the party primarily liable, makes the transaction usurious, as matter of law. These cases seem to proceed upon the principle, that there is no substantial reason why the holder of the paper should dispose of it for less than its face, when he may be called upon to repay its full amount; and therefore the transaction must be regarded as intended by the parties to be an

actual loan, upon usurious interest. (*m*) According to the weight of authority, however, where there is sufficient evidence that the transaction was a sale, and not a covert loan, the fact that the seller indorsed the paper, is not considered as changing the character of the contract, and making it usurious. Nevertheless, these cases seem to admit, that if the purchaser could recover from the seller and indorser the full amount of the face of the paper sold, the contract would be a loan, and usurious; and they therefore decide that the purchaser is limited in his action against the seller and indorser, to a recovery of the amount actually paid by him, with lawful interest thereon. (*n*) We think, however, that these cases proceed upon a wrong principle, and the courts seem to be misled by a difficulty in the application of their principles to practice. If a payee of a note actually sell it to a purchaser, with his indorsement, the whole transaction, upon analysis, will be found to be this: It is not a loan of money, but the purchaser of the note buys a right to sue the maker of the note, and also an engagement for value on the part of the seller, that the maker shall pay the face of the note. There is no more loan in the case, than in the sale of goods, with a warranty that they shall be fit for the purposes for which they are bought. It may be true that he can get much more for the note if he indorses, than if he does not; and it may be true that he will get more for the goods if he warrants them, than if he does not; but in neither case does this circumstance convert the sale into a loan. It often happens that the seller is known to be in insolvent or very precarious circumstances, without any probability of being able to refund, in case of the maker's default; here the value of the paper consists of the indorser's liability to pay; but it would be difficult to show that even this transaction was essentially a loan to the indorser. Undoubtedly, a usurious transaction

(*m*) Ballinger *v.* Edwards, 4 Ire. Eq. 449; M'Elwee *v.* Collins, 4 Dev. & B. 209; *Walworth*, Ch., Cram *v.* Hendricks, 7 Wend. 573. *Cowen*, J., Rapelye *v.* Anderson, 4 Hill, 472.

(*n*) Cram *v.* Hendricks, 7 Wend, 569; Rapelye *v.* Anderson, 4 Hill, 472; Ingalls *v.* Lee, 9 Barb. 647: French *v.* Grindle, 15 Maine, 15; Farmer *v.* Sewall, 16 Maine, 456; Lane *v.* Steward, 20 Maine, 98; Brock *v.* Thompson, 1 Bailey, 322. See also Freeman *v.* Brittin, 2 Harrison, 191; Metcalf *v.* Pilcher, 6 B. Mon. 530; May *v.* Campbell, 7 Humph. 450.

might seek the disguise of this form of contract, as well as of any other. And neither this nor any disguise should protect it. But we speak of actual sales of notes and bills, by indorsement, in good faith. And of these, the preceding considerations have led us to the conclusion we have above stated. We go, perhaps, beyond the authorities, but not beyond the practice; and we cannot but think that the rule of law should be, that in case of an actual sale of a note, at a discount, with an indorsement by the seller, the indorser should be held liable for the full amount, on the maker's default.

These considerations lead us to those cases where one indorses or gives accommodation paper, for a premium paid him, which may be an outright sum, or a percentage. Such a transaction has been thought, by many courts and judges, to be usurious, if the sum paid exceed six per cent. on the notes indorsed or given; but we think it is not so, on the plain ground that a man may sell his credit, as well as anything else that he has, and may sell it for the most that he can get.

The earlier cases on this subject held that upon a sale of one's credit in this manner, the party indorsing or guaranteeing, might receive a compensation for so doing, provided it did not exceed lawful interest upon the amount of the debt guaranteed, or the credit sold. (*o*) But if a transaction of this kind can be regarded as such a sale of credit as that a price may be taken therefor by the seller as his payment, we do not see, upon principle, any limit to the amount which may be taken, other than belongs to all sales. When a party indorses a note, or guarantees a debt, as surety for another, he actually advances no money, and is therefore at no pecuniary loss, until compelled by reason of his suretyship, to pay the debt for which he was bound. If he pays this, the law creates, at once, an obligation upon the party whose debt he pays, to reimburse to him the sum he pays with legal interest. And if the sum originally received by a party thus selling his credit, is to be considered as interest, added to the amount for which the law gives him this obligation, there is a larger amount secured for interest, than the legal interest,

(*o*) Day *v.* Dunham, 2 Johns. Ch. 122; Bullock *v.* Boyd, 1 Hoff. Ch. 294; 182; Fanning *v.* Dunham, 5 Johns. Ch. Moore's Exr. *v.* Vance, 3 Dana, 361.

whatever be the amount paid for the credit; for all that is paid is excess. On this ground, therefore, the sale is no better, whether more or less is paid. But if the transaction is to be considered as a sale of the credit of the party indorsing; which credit is his property, to dispose of as he pleases, and property which the purchaser may profitably and lawfully buy, the price paid and received must be considered as entirely independent of the resulting right of the indorser or guarantor to get indemnity if he can, for whatever he is obliged to pay. It is then no loan, but a sale, which, in respect to the price that may be paid, is like any other sale; and this view, we think, is sustained by the later and better authorities. (*p*)

In the case of cross notes, where A. gives his note to B., and B. gives his note to A., but A.'s credit is much better than B.'s, and it is a part of the bargain that the notes from B. to A. shall be greater than the notes from A. to B., or that A. shall have any sum by way of a premium on the transaction; this has been considered usurious; but not, as we think, on sufficient grounds. Here, as before, we deem it a lawful sale of one's credit, and neither borrowing nor lending, nor forbearing money in any way. (*q*) We repeat, however, the remark, to avoid misconception, that we speak only of *bonâ fide* transactions of this kind, and not of those which are used as mere pretences for actual usury. This, however, would generally be a question of fact for the jury, and not a question of law.

SECTION XIII.

OF COMPOUND INTEREST.

Contracts for compound interest are sometimes said to be usurious, but this may not be considered quite certain. We are aware of no case, in England or in this country, in which

(*p*) See Ketchum *v.* Barber, 4 Hill, 224; More *v.* Howland, 4 Den. 264; Dry Dock Bank *v.* American Life Ins. & Trust Co. 3 Coms. 344.

(*q*) See Dunham *v.* Gould, 16 Johns. 367; Dry Dock Bank *v.* American Life Ins. & Trust Co. 3 Coms. 344.

a contract to pay compound interest has been held usurious, so as to become totally invalid, or in which the actual reception of compound interest has been held to be a commission of the crime of usury, and punishable as such. Indeed, it is difficult to see how this could be the case. If A. lend to B. one hundred dollars, for two years, at six per cent. legal interest, payable annually, and it is agreed that if B. does not pay the interest at the end of the first year, it shall be considered as principal, and added to the amount of the loan from that time, (which is a contract for compound interest), and the interest not being paid annually, A. becomes entitled at the end of the two years to receive, and does receive, under the agreement, one hundred and twelve dollars and thirty-six cents, instead of one hundred and twelve dollars, the principal and simple interest, he does not receive more than after the rate of six dollars per year for the forbearance of one hundred, but has received exactly that sum, and six per cent. legal interest upon another sum which B. was under a legal obligation to pay him, for which B. might have been sued, and for the forbearance of which he has agreed to pay its legal value. Accordingly, courts have not attempted to declare such contracts usurious, and the extent to which they have gone is that of refusing to enforce a contract to pay interest thereafter to grow due; and have done this, not upon the ground of usury, but rather as a "rule of public policy," because such agreements "*savor* of usury," and "lead to oppression." (*r*)

On the other hand, if an agreement is made to convert interest already due into principal, or if accounts between parties are settled by rests, and therefore, in effect, upon the principle of compound interest, which may be done by an express accounting, (*s*) or under a custom of forwarding

(*r*) Orsulton *v.* Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99; Chambers *v.* Goldwin, 9 Ves. 271; Dawes *v.* Pinner, 2 Camp. 486 n.; Doe *v.* Warren, 7 Greenl. 48; Hastings *v.* Wiswall, 8 Mass. 455; Camp *v.* Bates, 11 Conn. 487; Mowry *v.* Bishop, 5 Paige, 98; Childers *v.* Deane, 4 Rand. 406; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Wilcox *v.* Howland, 23 Pick. 169.

(*s*) Orsulton *v.* Yarmouth, 2 Salk. 449; Tarleton *v.* Backhouse, Cooper's Ch. Reps. 231; Mowry *v.* Bishop, 5 Paige, 98; Fobes *v.* Cantfield, 3 Ham. 18; Childers *v.* Deane, 4 Rand. 406.

accounts quarterly, half-yearly, or yearly, to the debtor, who acquiesces in them by his silence; (*t*) these transactions are valid, and sanctioned by the law; and such a method of computation is sometimes even directed by courts. (*u*) If compound interest has accrued, even under a prior bargain for it, and been actually paid, it cannot be recovered back, (*v*) nor are the penalties affixed to the crime of usury annexed to such taking; and if a note be given for such payment, the note has a sufficient legal consideration to sustain an action upon it. (*w*)

We are not sure that contracts to pay interest upon interest may not derive illustration from a comparison with those, upon which the law, as we have seen, is quite well settled, where one engages to pay money at a certain time, and then binds himself to pay a further sum, exceeding interest, if the principal sum be not duly paid; this is certainly not usurious. One of the reasons for this rule is, that the penalty will be reduced, in equity, to the amount of the debt; but another, and as we think, the principal reason is, that the debtor may pay his debt when it is due, and thus avoid the contract of penalty; so that there is, in such case, no absolute contract for the payment of more than legal interest. Now, one who promises to pay a debt at a certain time, and interest to be compounded as it falls due, can, by payment of the debt or of the interest when it falls due, always avoid the compounding.

These differences between contracts for compound interest and usurious agreements, clearly establish that the former are not in their nature the same with the latter. If they were so, a contract to pay compound interest might render the whole agreement into which it was introduced invalid, so that not even the principal nor simple interest could be recovered, and upon the actual payment of compound interest it could be recovered again, and no subsequent agreement

(*t*) Caliot *v.* Walker, 2 Anstr. 496; Eaton *v.* Bell, 5 B. & Ald. 34; Morgan *v.* Mather, 2 Ves. 15; Bruce *v.* Hunter, 3 Camp. 466; Moore *v.* Voughton, 1 Stark. 487; Bainbridge *v.* Wilcox, 1 Bald. 536. See also Pinhorn *v.* Tuckington, 3 Camp. 467.

(*u*) See vol. 1, p. 103. (*b.*)

(*v*) Dow *v.* Drew, 3 New Hamp. 40; Mowry *v.* Bishop, 5 Paige, 98.

(*w*) Otis *v.* Lindsay, 1 Fairf. 316; Wilcox *v.* Howland, 23 Pick. 169; Kellogg *v.* Hickok, 1 Wend. 521.

could give such a contract any validity or effect; all of which we have seen is not the case.

Upon the whole, although it seems to be well settled, that compound interest cannot be recovered, as such, although it be expressly promised, (*x*) we are inclined to think, that the only rule of law against the allowance of compound interest is this; that courts will not lend their aid to enforce its payment, unless upon a promise of the debtor made *after* the interest upon which interest is demanded, has accrued; and this rule is adopted, not because such contracts are usurious, or savor of usury, unless very remotely, but upon grounds of public policy, in order to avoid harsh and oppressive accumulations of interest. And for the reason that this aversion of our law, to allow money to *beget* money, has of late years very much diminished, we do not think it absolutely certain, that a bargain in advance for the payment of compound interest, in all its facts reasonable and free from suspicion of oppression, would not be enforced at this day, in some of our courts. (*y*)

(*x*) Lord Ossulston *v.* Lord Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Mowry *v.* Bishop, 5 Paige, 98; Hastings *v.* Wiswall, 8 Mass. 455; Ferry *v.* Ferry, 2 Cush. 92; Rodes *v.* Blythe, 2 B. Mon. 336; Childers *v.* Deane, 4 Rand. 406; Doe *v.* Warren, 7 Greenl. 48. But see Pawling *v.* Pawling, 4 Yeates, 220. But annual rests in merchants' accounts, are allowed: Stoughton *v.* Lynch, 2 Johns. Ch. 210, 214; Barcly *v.* Kennedy, 3 Wash. C. C. 350; but not after mutual dealings have ceased. Dennister *v.* Imhrie, 3 Wash. C. C. 396, 402; Von Hemert *v.* Porter, 11 Metc. 210. In cases where it is expressly stipulated that interest shall be payable at certain fixed times, it has been held that interest may be charged upon the interest, from the time it is payable. Kennon *v.* Dickens, 1 Taylor, 231; S. C. Cameron & Norwood, 357; Gibbs *v.* Chisolm, 2 Nott & McCord, 38; Singleton *v.* Lewis, 2 Hill's (S. C.) 408; Doig *v.* Barkley, 3 Richardson, 125; Peirce *v.* Rowe, 1 N. H. 179. But it is held otherwise in Ferry *v.* Ferry, 2 Cush. 92; Doe *v.* Warren, 7 Greenl. 48. See 1 American Leading Cases, 341, 371.

(*y*) See *Woodbury*, J., Peirce *v.* Rowe, 1 N. H. 183; Pawling *v.* Pawling, 4 Yeates, 220; Kennon *v.* Dickens, Taylor, (1802,) 235; Gibbs *v.* Chisolm, 2 Nott & McCord, 38; Talliaferro's Exrs. *v.* King's Admr. 9 Dana, 331.

We add the following Table, from the Bankers' Magazine, for January, 1855, containing a statement, in a condensed form, of the laws of the several States in relation to interest and usury:—

Legal Rate of Interest.	*Per cent.*	*Penalty for Violation of Usury Laws.*
Maine, ...	6	Excess not recoverable.
New Hampshire, ...	6	Forfeit three times the interest.
Vermont, ...	6	Excess may be recovered back.

Legal Rate of Interest.	*Per cent.*	*Penalty for Violation of Usury Laws.*
Massachusetts,	6	Forfeit three times the whole interest.
Rhode Island,	6	Excess may be recovered by payer.
Connecticut,	6	Forfeiture of all the interest.
New York,	7	Forfeiture of contract.
New Jersey,	6	Forfeiture of contract.
Pennsylvania,	6	Forfeiture of contract.
Delaware,	6	Forfeiture of contract.
Maryland,	6	Excess recoverable by payer.
Virginia,	6	Contract void.
North Carolina,	6	Contract void.
South Carolina,	7	Forfeiture of all the interest.
Georgia,	7	Forfeiture of all the interest.
Alabama,	8	Forfeiture of all the interest.
Arkansas,	6	Contract void.
Florida,	6	Forfeiture of all the interest.
Illinois,	6	Defendant recovers his cost.
Indiana,	6	Fine of five times the whole interest.
Iowa,	6	Forfeiture of excess of interest.
Kentucky,	6	Contract for interest void.
Louisiana,	5	Forfeiture of all the interest.
Michigan,	7	No penalty.
Mississippi,	6	Forfeiture of excess of interest.
Missouri,	6	Forfeiture of excess of interest.
Ohio,	6	Forfeiture of excess of interest.
Tennessee,	6	Liable to indictment for misdemeanor.
Texas,	8	Forfeiture of all the interest.
Wisconsin,	7	Special contracts, 12 per cent.
California,	10	No penalty.

There are various States that permit a higher rate of interest on special contracts, viz: — In Vermont, 7 per cent. may be charged upon railway bonds; in New Jersey, 7 per cent. may be charged in Jersey city and the township of Hoboken; in Maryland, the penalty is a matter of some doubt, in consequence of a late decision of Judge Taney, which does not, however, meet the assent of the bar of Baltimore; in Arkansas, 10 per cent. may be charged on special contracts; in Illinois, the banks may charge 7 per cent., and 10 per cent. may be charged between individuals on special contracts; in Iowa, 10 per cent. is allowed on special contracts; in Louisiana, 8 per cent. may be so charged; in Michigan, contracts in writing are legal to charge 10 per cent.; the same in Mississippi and Ohio; in Texas, 12 per cent. may be charged on special contracts.

CHAPTER VII.

DAMAGES.

Sect. 1.—*Of the General Ground and Measure of Damages.*

It has already been remarked that the common law does not aim at preventing a breach of duty, or compelling the fulfilment of a contract by direct means. This equity does. But, as a general rule, the common law contents itself with requiring him who has done an injury to another, to pay to the injured party damages. And even where, as in debt or assumpsit, for a specific sum, the action is, in fact, as Lord *Mansfield* remarked, (*z*) a suit for specific performance, it is not altogether so in form.

The principle which measures damages, at common law, is that of giving compensation for the injury sustained; — a compensation which shall put the injured party in the same position in which he would have stood had he not been injured; (*a*) the simplest form of which occurs where the ground of the action is the wrongful non-payment of money due, and the damages consist of the money, with interest, for the whole period intervening between the refusal and the judgment. But in many instances the law lessens this compensation, leaving upon the injured party a part of his loss; and in some, increases the compensation, by way of punishment, to the wrong-doer.

(*z*) "Pecuniary damages upon a contract for payment of money, are, from the nature of the thing a specific performance." Per Lord *Mansfield*, in Robinson *v.* Bland, 2 Burr. 1077, 1086. See also Rudder *v.* Price, 1 H. Bl. 547, 554. Per Lord *Loughborough*.

(*a*) "*Damna*," says Lord *Coke*, "in the common law hath a special signification for the recompense that is given by the jury to the plaintiff or demandant, for the wrong the defendant hath done unto him." Co. Litt. 257, a.

SECTION II.

OF LIQUIDATED DAMAGES.

The law will permit parties to determine by an agreement which enters into the contract, what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. Damages thus agreed upon beforehand, when sanctioned by the law, are called liquidated damages. Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or in the nature of a penalty. And the question whether damages agreed upon are to be treated as liquidated, or as in the nature of a penalty and therefore disregarded, often occurs, and is not always of easy or obvious solution.

By a bond with conditions, (an ancient, and somewhat peculiar instrument), a party, (the obligor) first acknowledges himself bound to another party (the obligee) in a certain sum of money. Then follows an agreement, in the form of a condition, that if the obligor shall do a certain other thing, which may or may not be the payment of other money, the obligation above mentioned shall be void. It is obvious that the primary purpose of the instrument, if the parties are honest, is that the thing shall be done which is recited in the condition. And the secondary purpose is, that if that thing be not done, the money for which the obligor is bound shall be paid by way of compensation to the obligee, and by way of punishment to the obligor. Hence its name of penalty. And, as in fact, the obligee always took care that the penalty should be high enough to give him full compensation, and operate as a powerful motive upon the obligor, it happened generally, if not always, that the penalty was much more than compensation for the wrong done by a breach of the condition. But the law had no remedy for this; and one of the earlier of the just and merciful interpositions of the courts of equity, was to reduce the sum mentioned in the penalty to the actual measure of the injury sustained, so

as to make it full compensation, but no more. (*b*) The propriety and expediency of this relief were so obvious, that courts of law, aided by statutes, soon applied it, and now, both in England and America, this is constantly done by the courts of law. (*c*) And in this practice, and the reasons for it, we may find principles which aid us in drawing the distinction between liquidated damages and a penalty. For it is obvious that where parties agree upon the damages to be paid for a breach of contract, whatever name they give to it, they do substantially the same thing which is done by a bond with penalty. And there is no more reason why the courts should regard the agreement, if it opposes reason and justice, in the one case than in the other.

One rule, therefore, is this: that the action of the court shall not be defined and determined by the terms which the parties have seen fit to apply to the sum fixed upon. Though they call it a penalty, or give to it no name at all, it will be treated as liquidated damages, that is, it will be recognized and enforced as the measure of damages, if from the nature of the agreement and the surrounding circumstances, and in reason and justice it ought to be. (*d*) And though they call it liquidated damages, it will be treated as a penalty, if from a

(*b*) Tit. Bond and Penalty, Eq. Cas. Abr. 91, 92; Butie *v.* Falkland, 3 Ch. Cas. 135, per Lord *Somers*.

(*c*) 4 Anne, c. 16, §§ 12, 13. During a short period before this statute, the practice appears to have been this. The defendant, on motion, was allowed to bring the whole amount of the penalty into court, and the proceedings were thereupon stayed. The plaintiff, however, received only the amount of the principal, interest, and costs, and if this did not equal the amount of the penalty, the defendant was allowed to take out the remainder. Ireland's case, 6 Mod. 11; Gregg's case, 2 Salk. 596; Anons. 6 Mod. 11. The court said, in Burridge *v.* Fortescue, 6 Mod. 60. "It is an equitable motion to be relieved against the penalty."

(*d*) In Sainter *v.* Ferguson, 7 C. B. 716, the defendant agreed not to "practise as surgeon or apothecary, at Macclesfield, or within seven miles thereof, *under a penalty of* 500*l*." It was held that the 500*l*. was not a penalty, but liquidated damages. *Coltman*, J., said: "Although the word 'penalty,' which would *primâ facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of the agreement, and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages." Chamberlain *v.* Bayley, 11 N. H. 234, 240, per *Upham*, J.; Brewster *v.* Edgerly, 13 N. H. 275. In Chiddick *v.* Marsh, 1 N. Jer. 463, 465, *Green*, C. J., said: "If upon the face of the instrument, it be doubtful whether the contracting parties intended that the sum specified in the agreement should be a penalty or liqui-

consideration of the whole contract it appears that the parties intended it as such, (*e*) or if, where the injury is certain, the sum fixed upon is clearly disproportionate to such injury and the real claim which grows out of it.

Among the principles which have been found useful in determining this last question, perhaps the two most important and influential are these. The sum agreed upon will be treated as penalty, unless, first, it is payable for an injury of uncertain amount and extent; and second, unless it be payable for one breach of contract, or if for many, unless the damages to arise from each of them are of uncertain amount.

The first rule may be illustrated by a promise to pay one thousand dollars in three months, with an agreement that if the promisor fails in this payment he shall pay to the promisee two thousand dollars, by way of liquidated damages. Here it is at once obvious and certain that this bargain differs in no respect but that of form from a bond with a penalty in the larger sum, conditioned to pay the less; and that it must necessarily be treated in the same way; that is, the penalty must be reduced to the measure of the actual damages. The general reason of this rule is, that where

dated damages, the inclination of courts is to consider the contract as creating a penalty to cover the damages actually sustained by a breach of the contract, and not liquidated damages." Bagley *v.* Peddie, 5 Sandf. 192; Crisdee *v.* Bolton, 3 Car. & Payne, 240; Tayloe *v.* Sandiford, 7 Wheat. 13; Shute *v.* Taylor, 5 Metc. 61, 67, per *Shaw*, C. J.; Baird *v.* Folliver, 6 Humph. 186. See Lindsay *v.* Amsley, 6 Ired. 186. In Smith *v.* Dickenson, 3 Bos. & Pul. 630, the court expressed themselves clearly of opinion, that the word "penalty" being used in the agreement effectually prevented them from considering the sum mentioned as liquidated damages. The bond, in Fletcher *v.* Dyche, 2 T. R. 32, used the words "*forfeit and pay;*" but the sum mentioned was held as liquidated damages. The Supreme Court of the U. S. in Tayloe *v.* Sandiford, 7 Wheat. 13, say this case is clearly distinguishable from a case where the word penalty is used; also per C. J. *Marshall:* "In general a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves expressly denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention." But in Hodges *v.* King, 7 Metc. 583, 588, per *Hubbard*, J.: "The bond has indeed a condition, but that is matter of form, and cannot turn that into a penalty, which, but for the form, is an agreement to pay a precise sum, under certain circumstances."

(*e*) In Davis *v.* Penton, 6 B. & C.

the injury resulting from a breach of contract, is ascertainable at once by computation, or is capable of immediate and exact measurement by other means, so that the parties could have certainly provided for exact compensation, if the sum they agree upon is more than this, it may be presumed that it was really intended as a penalty, or that there was oppression on the one side and weakness or inadvertence on the other; or if not these, that the principle was disregarded, which, alone, the law recognizes as the first measure of damages, that is, the principle of compensation. And the court will do, with the aid of a jury, what the parties have not done; that is, they will apply this principle. (*f*) But where, among all the possibi-

216, 224, *Littledale*, J., said: "Before the 8 & 9 W. 3, the whole penalty might be recovered at law; and the party against whom it was recovered was driven to seek relief in a court of equity. The statute only contains the word "penalty." Since the statute, parties in framing agreements, have frequently changed that word for *liquidated damages;* but the mere alteration of the term cannot alter the nature of the thing; and if the court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute." In that case the parties were bound "in the penal sum of 500*l.*, to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages." The 500*l.* was held to be a penalty and not *liquidated damages*. See Hoag *v.* McGinnis, 22 Wend. 163. The limitations of this principle appear to be well stated, in Price *v.* Green, 16 M. & W. 346, 354. The defendant was bound in the sum of 5,000*l.* by way of liquidated damages, and not of penalty, not to carry on his trade within certain limits. It was held that the plaintiff could recover the 5,000*l.* as liquidated damages. *Patteson*, J., said: "Where it is a sum named in respect of the breach of one covenant only, and the intention of the parties is clear and unequivocal, the courts have indeed held, that, in some cases, the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument that the real intention was different."

(*f*) There has been much conflict in the decisions which have been made upon this class of contracts. While some of the courts have been disposed to apply to them the ordinary rules of construction, and to carry out the intention of the parties, as expressed in the instrument, without regard to its justice, others have been inclined, in almost all cases, to regard the sum fixed upon as a penalty, and to settle themselves, with the aid of a jury, the question of damages, notwithstanding the expressions used by the parties. But the law appears to be now settled, that the courts will apply to these contracts the ordinary rules of construction, and carry out the expressed intention of the parties, unless one of the two rules laid down in the text is found to apply. The first rule, which appears to have been confined to the case in which it is agreed to pay a larger sum of money as liquidated damages, on a failure to pay a smaller sum on a given contingency, was laid down in Orr *v.* Churchill, 1 H. Bl. 227. In that case a high rate of interest was to be paid "by way of penalty," upon a failure to pay over a sum of money, at a fixed time. Lord *Loughborough* said: "Where the question is concerning the non-payment of money, in circumstances like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages; otherwise the law might be eluded by

lities of injury resulting from a breach of contract, it is impossible to select the certain or probable results, or to define them

the parties. It may often, indeed, happen, that the damages sustained by the party contracting, by the non-payment of money at the time agreed on, may by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest; but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value." The same rule was recognized in Astley *v.* Weldon, 2 Bos. & Pull. 346, 354, where *Chambre*, J., said: "There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger." Again, in Kemble *v.* Farren, 6 Bing. 141, 148, *Tindal*, C. J., said: "That a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve by directing juries to assess the real damages sustained by a breach of the agreement." But the very late English authorities have shown a decided inclination to disregard this rule, and to carry out the intentions of the parties as expressed in the agreement. See Price *v.* Green, *supra*, n. (*e*). In Galsworthy *v.* Strutt, 1 Exch. 659, 665, *Parke*, B., with Astley *v.* Weldon, and Kemble *v.* Farren before him, said: "I take it that it would be competent for the parties to make a stipulation for the payment of a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done I do not see how the courts can avoid giving effect to such a contract." But in this country the rule, as stated in the text and in the earlier cases, appears to be generally recognized. In Gray *v.* Crosby, 18 Johns. 219, 226, *Woodworth*, J., in remarking upon a case where a party covenanted on a certain contingency to pay a sum of money, with proviso that if he refused, he was then to pay a larger sum as liquidated damages, said: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a sure protection for usury, and countenance oppression under the forms of law." See Bagley *v.* Peddie, 5 Sandf. 192; Williams *v.* Dakin, 22 Wend. 211, per *Walworth*, Ch.; Hoag *v.* McGinnis, 22 Wend. 163; Heard *v.* Bowers, 23 Pick. 455, 462; Sessions *v.* Richmond, 1 R. I. 298, 303; Plummer *v.* McKean, 2 Stewart, 423. But see Jordan *v.* Lewis, Id. 426. This rule has also received the sanction of the Superior Court of New Hampshire, although that court has generally been decidedly in favor of applying the ordinary principles of construction to agreements for the liquidation of damages. Thus, in Mead *v.* Wheeler, 13 N. H. 351, 353, *Gilchrist*, J., said: "It is settled that when there is an agreement to pay a large sum, if the party fail to pay a smaller sum, the agreement to pay the penalty cannot be enforced beyond the amount of legal interest. Although in fact the creditor may suffer the most serious injury from the want of punctual payment of his debt, and the payment of principal and interest may very inadequately compensate him for his disappointment, still the payment of more than legal interest cannot be enforced under the denomination of a penalty, although, if the agreement to pay a penalty be in accordance with the general usage and practice of a particular trade, it has been held that it might be enforced, even if it should exceed the legal interest. Floyer *v.* Edwards, Cowper, 112; *Ex parte* Aynsworth, 4 Ves. 678. The payment of money being the thing to be done, as money is the only measure of damages, no closer approximation to the damages sustained can be made, than to estimate them at the sum agreed to be paid, and the interest thereon. This consideration, with the necessity of enforcing the laws against usury, affords perhaps as good a reason why the party should be compelled to pay no more than the sum specified, and the interest, as the inequity of his paying a large sum for the omission to pay a smaller sum." In establishing this rule the courts seem to have been influenced

with any precision by reference to a money-standard, here the parties may agree beforehand what the injury shall be valued at, or what shall be taken for a compensation; for if the court sets it aside, it can only do what it may be supposed the parties had a right to do and have done, and that is, arrive at a general probability by a consideration of all the circumstances of the case. Such an agreement, therefore, the court will not set aside, unless for such obvious excess and disproportion to all rational expectation of injury, as make it certain that the principle of compensation was wholly disregarded.

The second rule is derived from similar considerations. Let us suppose a contract between parties, one of whom, for good consideration, promises to the other to do several things, and then it is agreed that the promisor shall pay, by way of liquidated damages, a large sum, if the promisee recover against him in an action for a breach of this contract. It must be supposed that this sum is intended and regarded as adequate compensation for a breach of the whole contract; for it is all that the promisor is to pay if he breaks the whole. It would, of course, be most unjust and oppressive to require of him to pay this whole sum, for violating any one of the least important items of the contract. But such would be the effect if the words of the parties prevailed over the justice of the case. The sum to be paid would, therefore, be treated as a penalty, and reduced accordingly, unless the agreement provided that it should be paid only when the whole contract was broken, or so much of it as to leave the remainder of no value; or else the sum agreed upon was broken up into parts, and to each breach of the contract its appropriate part assigned; and the sum or sums payable came in other respects within the principles of liquidated damages. (*g*)

more or less by a desire to prevent an evasion of the statutes against usury. But as it is settled that this class of cases does not come within these statutes; Cutler *v.* Dow, 8 Mass. 257; Floyer *v.* Edwards, Cowper, 112, 115, per Lord *Mansfield;* we think the rule may more safely rest upon the grounds taken in the text, than upon considerations of that nature.

(*g*) In Astley *v.* Weldon, 2 Bos. & Pull. 346, 353, Heath, J., said, "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty." The subsequent case of Reilly *v.* Jones, 1 Bing. 302, has been thought inconsistent with this principle, but it was not so considered by the court, but the sum mentioned was held to be liquidated

With the exception of these rules of construction, which seem to have grown out of the peculiar nature of this class

damages, because it was so called by the parties, and the agreement was in substance for the performance *of one thing only*. See Barton *v.* Glover, Holt, N. P. 43. In Kemble *v.* Farren, 6 Bing. 141, the action was assumpsit, by the manager of Covent Garden Theatre, against an actor to recover liquidated damages for the violation of an engagement to perform. There were several stipulations, of various degrees of importance, on each side, "*some sounding in uncertain damages, others relating to certain pecuniary payments;* and the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said engagement, *or any part thereof, or any stipulation therein contained,* such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*" Notwithstanding the strong expressions used by the parties, the sum was held to be a penalty, and not liquidated damages. But *Tindal*, C. J., said, "If the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages, upon any such breach, at 1,000*l.*; thus restricting the application of the general rule cited above, from Astley *v.* Weldon, to cases in which some of the stipulations are of certain nature and amount. This decision has been followed in England, in Edwards *v.* Williams, 5 Lamb. 247; Crisdee *v.* Bolton, 3 Car. & Payne, 240, 243; Boys *v.* Ancell, 5 Bing. N. C. 390, S. C. 7 Scott, 364; Street *v.* Bigby, 6 Ves. 815; Beckham *v.* Drake, 8 M. W. 846, 853; Horner *v.* Flintoff, 9 Id. 678; Galsworthy *v.* Strutt, 1 Exch. 659; Atkins *v.* Kinnier, 4 Exch. 776. The present state of the law in England may be gathered from the following remarks of *Parke*, B., in Atkyns *v.* Kinnier. "The rule of law, as laid down in Kemble *v.* Farren, (which I cannot help thinking was somewhat stretched,) was, that although the parties used the words "liquidated damages," yet, when the context was looked at, it was impossible to say that they intended that the amount named should be other than a penalty, inasmuch as the agreement contained various stipulations, some of which were capable of being measured by a precise sum, and others not; as, for instance, the plaintiff was to pay the defendant a certain weekly salary, which was capable of being strictly measured, and was far below 1,000*l.*; therefore, upon a reasonable construction of the covenant, the words "liquidated damages" were to be rejected, and the amount treated as a penalty. That decision has since been acted upon in several cases, and I do not mean to dispute its authority. Therefore, if a party agrees to pay 1,000*l.*, on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract, consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty. In this case there is no pecuniary stipulation for which a sum certain, of less amount than 1,000*l.* is to be paid, but all the stipulations are of uncertain value. Possibly this may have been a very imprudent contract for the defendant to make; but with that we have nothing to do. Upon the true construction of the deed, the amount is payable by way of liquidated damages, and not as penalty." The decision of Kemble *v.* Farren was questioned by *Gilchrist*, J., in Brewster *v.* Edgerly, 13 N. H. 275, 278, but it has been generally recognized in this country as sound law. Williams *v.* Dakin, 17 Wend. 447, 455; S. C. 22 Wend. 201, 212; Jackson *v.* Baker, 2 Ed. Ch. 471; Heard *v.* Bowers, 23 Pick. 455; Shute *v.* Taylor, 5 Metc. 61, 67, per *Shaw*, J.; Moore *v.* Platte Co., 8 Miss. 467; Gower *v.* Saltmarsh, 11 Miss. 271; Carpenter *v.* Lockhart, 1 Cart. (Ind.) 434, 443; Bright *v.* Rowland, 3 How. (Mis.) 398, 413; Chaddick *v.* Marsh, 1 New Jersey, 463; Curry *v.* Larer, 7 Penn. St. 470. In the late cases of Beale *v.* Hayes, 5 Sandf. 640, and Bagley *v.* Peddie, Id. 192, this question has been ably discussed, and this rule

of contracts, courts are guided by the intentions of the parties in determining whether the sum contracted to be paid upon the non-performance of a covenant is to be considered as liquidated damages, to be enforced according to the terms of the agreement, or as a penalty to be controlled by an assessment of damages by a jury; and in ascertaining these intentions of the contracting parties, the ordinary rules of construction are applied. (*h*)

established. The case of Beale *v.* Hayes arose out of a theatrical engagement, and was not distinguishable in its material facts from Kemble *v.* Farren, *supra*, which the court followed in deciding the case. In Bagley *v.* Peddie, the defendants were bound to pay "three thousand dollars, liquidated damages," in case A.; one of the defendants, should refuse to continue with, or serve the plaintiff, or should violate any of several other covenants contained in the agreements. Some of the covenants were clearly "certain in their nature, and the damages for their breach could be readily ascertained by a jury. The sum was held to be a penalty. *Sandford*, J., in delivering a very able opinion said: "The courts have leaned very hard in favor of constructing covenants of this kind to be in the nature of penalties, instead of damages, fixed and stipulated between the parties; and in so doing have established certain rules which will serve to guide us in determining this case. It may, perhaps, be justly, said, that in this struggle to relieve parties from what, on a different construction, would be most improvident and absurd agreements, the courts have sometimes gone very far towards making new contracts for them, somewhat varied from the stipulations, which, under other circumstances would be deduced from the language they used; but we believe no common-law court has yet gone so far as to reduce the damages conceded to have been liquidated and stipulated between the parties, to such an amount as the judges deem reasonable, which is the course in countries where the civil law prevails. Among the principles that appear to be well established, are these:—1. Where it is doubtful on the face of the instrument, whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. 2. On the contrary, where the language used is clear and explicit, to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned. 3. If the instrument provide that a larger sum shall be paid, on the failure of the party to pay a less sum, in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it. 4. When the covenant is for the performance of a single act, or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty. The cases of Reilly *v.* Jones, 1 Bing. 302; Smith *v.* Smith, 4 Wend. 468; Knapp *v.* Malthy, 13 Ibid. 587; and Dakin *v.* Williams, 17 Ibid. 447: S. C., in error, 22 Ibid. 201, were of this class. 5. Where the agreement secures the performance, or omission, of various acts, of the kind mentioned in the last proposition, together with one or more acts, in respect of which the damages, on a breach of the covenant, are certain, or readily ascertainable by a jury, and there is a sum stipulated as damages, to be paid by each party to the other, for a breach of any one of the covenants, such sum is held to be a penalty merely."

(*h*) In Perkins *v.* Lyman, 11 Mass. 76, 81, the court said: "The question, whether a sum of money mentioned in an agreement shall be considered as a penalty, and so subject to the chancery powers of this court, or as damages liquidated by the parties, is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract

SECTION III.

OF CIRCUMSTANCES WHICH INCREASE OR LESSEN DAMAGES.

We have said that the principle of *compensation* is that which lies at the foundation of the common-law measurement of damages. And this is not the less true, although there are difficulties in the application of this principle, and exact and adequate compensation is seldom the result of a lawsuit. Thus, the expenses of reaching this result, as counsel fees and the like, and the labor and anxiety even of successful litigation, are not often compensated, in fact, although the theory of the law, perhaps, includes so much of this as is actual labor and expense, in the costs recovered. (*i*) In some

provable by a written instrument, arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." The fact that the amount of the damages is uncertain, and cannot easily be determined by a jury, inclines the courts to treat the sum fixed upon as liquidated damages. Sainter *v.* Ferguson, 7 C. B. 716; Fletcher *v.* Dyche, 2 T. R. 32; Gammon *v.* Howe, 14 Maine, 250; Lingley *v.* Cutler, 7 Conn. 291; Mott *v.* Mott, 11 Barb. 127. See Lowe *v.* Peers, 4 Burr. 2225; Smith *v.* Smith, 4 Wend. 468. If the payment of the money appears to have been intended only to secure the performance of the main object of the agreement, the courts incline to hold it a penalty. Sloman *v.* Walter, 1 Bro. Ch. 418; Graham *v.* Bickham, 4 Dallas, 149; Merrill *v.* Merrill, 15 Mass. 488.

(*i*) In the theory of the law the taxed costs are a full indemnity for the expenses of a suit. In Doe *v.* Filliter, 13 M. & W. 47, in an action of trespass for mesne profits, the question was, whether the plaintiff was entitled to full costs, in the action of ejectment, as between attorney and client, or whether the taxed costs were to be considered as a full indemnity. The court held the latter. *Alderson*, B., said: "The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice, is another matter. The question is, what is to be the criterion by which the costs of getting back land are to be estimated? A plaintiff in ejectment is in the same situation as other suitors, all of whom sue for their rights, and obtain costs as an indemnity; and as other plaintiffs submit to have their costs taxed, so ought a plaintiff in ejectment. If the taxed costs are not a full indemnity, they ought to be made so." But in cases where the costs are not taxed, the plaintiff may recover his full expenses. Grace *v.* Morgan, 2 Bing. N. C. 534; Doe *v.* Filliter, *supra*, per *Pollock*, C. B. In admiralty courts, where the costs are at the discretion of the judge, counsel fees and the full expenses of litigation are often allowed. The Amiable Nancy, 3 Wheat. 546; The Venus, 5 Wheat. 127; The Apollo, 9 Id. 362; Canter *v.* American and Ocean Ins. Co. 3 Pet. 307. And in the common law courts, even in cases where the costs are taxed, this theory has not always been acted upon. In actions on covenants of warranty, and of seisin in the sale of real estate, the reasonable expenses of defending a previous suit for the recovery of the property, consisting of counsel fees and the like, have been recovered. Staats *v.* Ten Eyck, 3

suits, especially in those for the infringement of patents, the magnitude of the expense, in proportion to the sum recoverable in the suit itself, has led some courts to allow juries to include this expense in their verdicts; but we cannot think this legal. (*j*) The principle of compensation has, nevertheless, great power, and courts now seek to apply it to the measurement of damages even more than formerly. One of its consequences is that the plaintiff can, generally, recover, according to his proof, more or less than the amount specified in his declaration. (*k*) The only absolute limitation being the amount of the *ad damnum* which cannot be exceed-

Caines, 111; Pitcher *v.* Livingston, 4 Johns. 1; Waldon *v.* Long, 7 Id. 173; Sumner *v.* Williams, 8 Mass. 162; Sweet *v.* Patrick, 12 Maine, 9; Hardy *v.* Nelson, 27 Maine, 525. But see Leffingwell *v.* Elliott, 10 Pick. 204. So the expenses of defending a prior suit, on a breach of an implied warranty of title, on the sale of personal property, were allowed in Kingsbury *v.* Smith, 13 N. H. 109; but in Armstrong *v.* Percy, 5 Wend. 535, the court refused to allow more than the taxed costs. See Blaisdell *v.* Babcock, 1 Johns. 517; Lewis *v.* Peake, 7 Taunt. 152. In actions on the case and trespass, juries have sometimes been allowed, in assessing damages, to take into consideration counsel fees and other reasonable expenses in prosecuting the suit. Linsley *v.* Bushnell, 15 Conn. 225, *Waite*, J., dissenting; Noyes *v.* Ward, 19 Id. 250; Marshall *v.* Betner, 17 Ala. 833; Whipple *v.* Cumberland Manuf. Co. 2 Story, 661; Thurston *v.* Martin, 5 Mason, 497. But the weight of authority appears to be against such allowance. Barnard *v.* Poor, 21 Pick. 378; Lincoln *v.* S. & S. R. R. Co. 23 Wend. 425; Good *v.* Mylin, 8 Barr, 51, overruling Wilt *v.* Vickers, 8 Watts, 235, and Rogers *v.* Fales, 5 Barr, 154, 159; Young *v.* Turner, 4 Blackf. 277. The authority of Whipple *v.* Cumberland Manuf. Co. and Thurston *v.* Martin, is overthrown in the late case of Day *v.* Woodworth, 13 How. U. S. 363, where Barnard *v.* Poor, and Lincoln *v.* S. & S. R. R. Co. were approved, and what appears to be the true rule was stated by *Grier*, J., after asserting that vindictive or exemplary damages may be given in certain cases, adds: "It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."

(*j*) Counsel fees and other expenses were allowed in Boston *v.* Manuf. Co. 2 Mason, 120; Pierson *v.* Eagle Screw Co. 3 Story, 402; Allen *v.* Blunt, 2 W. & M. 121. But the authority of these is much shaken, if not overthrown, in Thompson *v.* The Railroads, Wallace Jr., 164, and by a dictum in Day *v.* Woodworth, 13 How. U. S. 372, where *Grier*, J., said: "The only instance in which this power of increasing the 'actual damage' is given by statute, is in the Patent Laws of the United States. But there it is given to the court and not to the jury. The jury must find the 'actual damages' incurred by the plaintiff at the time his suit was brought, and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessay trouble and expense to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury and again at the discretion of the court. The expenses of the defendant, over and above the taxed costs, are usually as great as those of the plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond taxed costs."

(*k*) Hutchins *v.* Adams, 3 Greenl. 174, Gould's Pleading, Ch., 4, § 37.

ed. (*l*) We shall recur to this question, of including expenses in damages, again.

Another effect is, that circumstances may be shown, in mitigation or in aggravation of the damages, which did, or do, in fact, mitigate or aggravate the injury; and, as we think, only these. (*m*) We are not now speaking of exemplary or vindictive damages. And in cases which do not raise this question, evidence of the defendant's motives, or of any thing which affects only the moral character of the transaction, ought not to be admitted, or to have any weight with the jury. The intention, therefore, is not an element in the case, unless it belongs directly to the issue. That is, the intention should not be shown by either party, to increase or lessen the damages, unless a bad purpose is one of the allegations of the plaintiff, expressly, or by implication of the law, because necessarily involved in the allegations. (*n*) Or, perhaps, unless a part of the case consists of words or acts which are harmless, if they are said or done as the manifestation of one intention or feeling, and injurious if of another. (*o*)

Compensation for injuries to property, or for a breach of contract in relation to property, is far more easily measured by money, than when it is sought for an injury to the person or reputation. Nevertheless, it is compensation only which is to be given; and the jury must measure this as well as they can, taking into consideration the whole injury which was sustained, and all its parts; as suffering, bodily and mentally, loss of time, or of money, or of labor, and the many mischiefs which ensue from a loss of reputation, in a community where one without a reputation is in effect an outlaw.

The bodily pain resulting from an injury, is always to be considered in estimating damages. (*p*) But mere mental

(*l*) Hoblin *v.* Kimble, 1 Bulstrode, 49; Curtiss *v.* Lawrence, 17 Johns. 111; Fish *v.* Dodge, 4 Denio, 311; Fournier *v.* Faggott, 3 Scam. 347; Cameron *v.* Boyle, 2 Greene, (Iowa), 154.

(*m*) See 3 American Jurist, 287, where this question is discussed with great learning and ability, by Mr. Justice *Metcalf*.

(*n*) As in actions for malicious prosecution. Jones *v.* Gwynn, 10 Mod. 148; Wiggin *v.* Coffin, 3 Story, 1.

(*o*) Weatherstone *v.* Hawkins, 1 T. R. 110; Rodgers *v.* Clifton, 3 Bos. & Pull. 587. See Prosser *v.* Browage, 4 B. & C. 271.

(*p*) Moore *v.* Albany & S. R. R. Co. 10 Barb. 621; Beardsley *v.* Swann, 4 McLean, 333.

suffering seems, in the cases, to be generally disregarded, unless the injury be wanton and malicious. (*q*) Where a contract is broken under aggravating circumstances, these may sometimes be given in evidence to increase the damages. (*r*) In general, however, the intention is not regarded; for it seems to be the rule of the common law, that a man suffers the same injury from an actual trespass, whether it was intentional or not; that is, the same amount of what the law calls injury, when inquiring what shall be compensated. (*s*) Hence a lunatic has been held liable for the injury he inflicted. (*t*) But, in such a case, nothing can enter into the damages which savors of a vindictive or exemplary character. (*u*) If circumstances are admitted in aggravation of damages which did not aggravate the injury, a wrong is done. But there are cases in which circumstances may be admitted, that show the true character of the facts which constitute the injury, and may thus, in effect, aggravate the damages, although they formed no part of the injury complained of. Thus in

(*q*) Flemington *v.* Smithers, 2 C. & P. 292; Blake *v.* Midland R. Co. 10 Eng. Law & Eq. 437. See Moore *v.* Albany & S. R. R. Co. 10 Barb. 621.

(*r*) In Coppin *v.* Brathwaite, 8 Jur. 875, the action was assumpsit on a contract to carry the plaintiff in a ship from London to Sheerness. It was alleged, as a breach, that the defendants by their agents, caused the plaintiff to be disembarked at an intermediate port, in a scandalous and disgraceful manner, and used towards him contemptuous and insulting language. It was held that these aggravating circumstances could be shown to increase the damages. *Parke*, B., said: "With respect to what was said by the captain, at the time of turning the plaintiff out of the vessel, I think it was properly received. There can be no doubt that the defendants are liable for every thing done in breach of the contract by the captain, acting as their servant. The breach of contract alleged in the declaration, is the refusing to carry the plaintiff in the ship, and turning him out of it, in a contemptuous manner, before the termination of the voyage. The turning him out is part of the breach, and the mode of turning him out is part of the evidence in the case. A contract is broken, and it is quite impossible to exclude from the view of the jury the circumstances under which it was broken. Surely, it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation. Suppose, instead of a man landed at Gravesend from a steamboat, this had been the case of a passenger in a ship bound to the West Indies, and that he were put ashore on a desert island, without food, or exposed to the burning sun and the danger of wild beasts, or even landed among savages; would not evidence be receivable to show the state of the island where he was left, and the circumstances attending the violation of the contract?"

(*s*) 3 American Jurist, 391, et seq.; Lambert *v.* Bessey, T. Raymond, 421; James *v.* Campbell, 5 C. & P. 372; Hay *v.* The Cohoes Co., 3 Barb. Sup. C. 42; McBribe *v.* McLaughlin, 5 Watts, 376.

(*t*) Morse *v.* Crawford, 17 Vermont, 499.

(*u*) Krom *v.* Schoonmaker, 3 Barb. 647.

an action of slander, it has been said that the plaintiff may prove, in aggravation of damages, other words than those he sets forth as constituting the slander. This we think very doubtful, in point of law and of right. But he may show other words, in order to illustrate and make apparent the meaning, character, and effect of the words which he alleges. These other words may inflict other and further injury, but must not be used or considered by the jury for the purpose of increasing the damages to be rendered in this action, because damages for those very words may be recovered in an action founded upon them. It seems reasonable, however, that a jury may use these other words in explanation of those declared upon, although a distinct action may be brought upon them, provided they are not permitted to be considered as increasing the injury inflicted by the words declared on, and so of increasing the damages. (*v*)

(*v*) There is much diversity in the English Nisi Prius decisions, upon the questions arising relative to the introduction of other words than those for which the action is brought, as evidence in suits for slander or libel. The subject was first thoroughly considered in Westminster Hall, in the late case of Peerson *v.* Lemaitre, 5 Man. & Gr. 700; 6 Scott, N. R. 607, where the Nisi Prius decisions were cited and commented on by counsel. The action was for libel, and the communication was not equivocal, or *prima facie* privileged, so that express malice need be shown, in order to maintain the action. It was held that other communications, containing in substance a repetition of the same libellous matter, and published after the suit was brought, and in themselves actionable, could be introduced to show that the defendant was actuated by malice in fact. *Tindal*, C. J., said: "And this appears to us to be the correct rule, viz., that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And, if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. . . Upon principle, we think that the *spirit and intention* of the party publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded, simply because it may disclose another and different cause of action." The law does not appear to be settled in this country. In Thomas *v.* Croswell, 7 Johns. 264, and Inman *v.* Foster, 8 Wend. 602, it was held, in the first case, that in actions for libel the plaintiff may give in evidence other publications which are not libellous; and, in the second case, that in actions for verbal slander, the plaintiff may prove other slanderous words, where the statute of limitations has run as to those words. And in Root *v.* Lowdes, 6 Hill, 518, in a case where malice was implied by law, the court held that the repetition of the same words should be received, but would not allow the plaintiff to prove any words which might be the subject of another action. See Keenholte *v.* Becker, 3 Denio, 346; Kendall *v.* Stone, 2 Sandf. Sup. 269. In Bodwell *v.* Swan, 3 Pick. 376, it was held that a repetition of the words for which the action was brought, or the uttering of words of similar import, might be given in evidence, to show that the first uttering of the words was malicious. But the court

SECTION IV.

OF EXEMPLARY AND VINDICTIVE DAMAGES.

Whether damages may be vindictive or exemplary, in the strict sense of these words, that is, whether in actions *ex delicto*, (to which it is generally admitted that exemplary damages must be confined,) (*w*) after a jury have gone to the full length of adequate compensation for the whole injury sustained by the plaintiff, the law authorizes them to begin anew, and add to these damages something more by way of punishment to the defendant, is a grave and difficult question, and high authorities stand ranged upon the affirmative and negative. On the one hand, it is said that there is nothing punitive in the nature of civil actions, and that if anything of the kind enters into them, it is an error or an abuse which does the great mischief of confounding two perfectly distinct jurisdictions. If one man sues for an injury, it should not enter into *his* compensation that the wrong done was of bad example and injurious effect to others; for if so others who are injured can sue also; and if beyond the injury which can be reached thus, there lies a mass of general wrong which no one man can take hold of, let the State come with its criminal process. But if these two things are mingled, then the civil process for remedy and compensation loses its just measure, and the criminal process is either not applied or is made inefficient, by the fact that its work is done, however imperfectly, elsewhere.

On the other hand it was distinctly asserted, so long ago as by Lord *Camden*, that, "damages are *designed* not only

also declared that they could go no further, and that they could not permit a distinct calumny, uttered by the defendant, to be given in evidence to prove his malice in speaking the words for which the action was brought. See Watson *v.* Moore, 2 Cush. 133. In Wallis *v.* Mease, 3 Binney, 546, it was held that other words than those in the declaration could be introduced to show malice, but that the damages must be given for those words only for which the action was brought. See Kean *v.* McLaughlin, 2 S. & R. 469. In Schoonover *v.* Rowe, 7 Blackf. 202, it was held that a repetition of the same words since the commencement of the suit could not be taken into consideration in assessing damages, although they might be given to show malice. See Burton *v.* Edwards, 1 Smith, (Ind.) 7; Rigden *v.* Wolcott, 6 Gill & Johns. 403; Wagner *v.* Holburmer, 7 Gill, 296.

(*w*) See Coppin *v.* Brathwaite, 8 Jurist. 875, cited *supra*, n. (*r*).

as a satisfaction to the injured person, but *as a punishment to the guilty.*" (*x*) And as all law should have for its constant end the prevention of wrong, the principle of punishment may well be mingled with that of compensation, in order to effect this purpose. And on this subject authorities are so numerous, so various, and so strong, that it must be conceded as a nearly established rule of law, that in certain cases, as in actions for libel, slander, assault and battery, false imprisonment, malicious prosecution, seduction, and the like, the jury may give some damages for the purpose of punishment, which on other grounds they would not give. (*y*)

In regard to the authorities, it may be confessed that by far the larger part are *obiter*, and some of them quite uncalled for; and that of some of those which would have most weight, the meaning is qualified and explained by other expressions used, or greatly restrained by the facts of the case. Moreover, in nearly all cases in which there is such malice as will allow the giving of exemplary damages, there is some insult or injury to the feelings for which the damages cannot be assessed by any definite rule. Hence it may be difficult to show, in any particular case, that damages have been allowed beyond the amount of the pecuniary loss and the injury to the person and to the feelings, unless we rely upon the precise words used in the instructions of the court. But with all allowance, there remain positive adjudications, and distinct and emphatic assertions, which go very far indeed to establish the lawfulness, in certain cases, of vindictive damages.

We cannot believe that it was ever a principle of the ancient and genuine common law, that damages should be punishment, or that the civil remedy for a wrong done should be punitive to the wrongdoer as well as compensative to the sufferer. Damages were not, originally, at least, *designed*

(*x*) 5 Campbell's Lives of the Lord Chancellors, 249.

(*y*) This question has been ably argued on the side against allowing exemplary damages, in 3 Am. Jurist, 287, by Hon. Theron Metcalf, and in the Law Reporter for April, '47, and in 2 Greenl. Ev. § 253, note, by Mr. Greenleaf: and on the other side, in the Law Reporter for June, 1847, and in Sedgwick on the Measure of Damages, by Mr. Sedgwick. The two articles in the Law Reporter are also published in the Appendix to the second edition of Sedgwick on the Measure of Damages.

for any such purpose. But it may still be a question whether the introduction of this principle, to a certain extent, and in certain cases, may not rest on good reasons, as well as good authorities. The common law is not perfect, nor so unwise as to call itself perfect. It has its civil process for compensation, and its criminal process for punishment, and it wisely demands that these should be kept distinct. But it might not be wise to insist that the work of punishment should not be done at all, or should be done very imperfectly, because the proper criminal process is unequal to the requirements of some cases, although this work can be well and adequately done by the civil process in precisely these cases. There are many wrongs, "*pessimi exempli*," of which the interest of the community demand the prevention, but which criminal process cannot reach at all, or cannot punish with any adequacy. The crime of seduction, sometimes worse in the character which it indicates, and in the injury which it inflicts, than murder, is one which criminal law cannot touch; and very many cases where a very great injury is compounded of elements which the criminal law if it does not ignore does not profess to regard as important, illustrate the occasional insufficiency of this branch of law. What good reason is there why what it cannot do, although it ought to be done, should not be done for it, by a collateral branch of the law? In the action for seduction, which must be brought for loss of service, or for a trespass *quare clausum*, laying the seduction only as an incident, the law first requires that the service, or the trespass, should be proved; but when this formal requirement is proved, it is forgotten, and the damages are measured by a totally different standard. It may be said, that here only the substantial *gravamen* is made the measure of compensation, instead of the formal *gravamen*. But it seems to be ruled in modern times, that when, in such a case, or at least in an action for breach of promise of marriage, a defendant defends himself by impeaching the character of the woman, which he may do, if he makes this a distinct point of his defence and then fails in the proof of it on the trial the jury may consider this attempt as good cause for swelling the damages. Such ruling recommends itself to our

moral feelings, and to a sense of right and justice; but it would be very difficult to maintain it as a rule of law, on any other than the punitive principle. (*yy*)

It is unfortunate that the word "vindictive" has been used as descriptive of these damages; "exemplary" is much better. For, on the whole, we are satisfied that the courts of this country generally permit a jury to give, in certain cases, damages which exceed the measure of legal compensation, and are justified by the principle that one found guilty of so great an offence should be made an example of, in order to deter others from the like wrong-doing. (*z*) In New Hampshire, (*a*) Connecticut, (*b*) New York, (*c*) Pennsylvania, (*d*) Alabama, (*e*) and Louisiana, (*f*) this has been distinctly asserted, and the Supreme Court of the United States has positively and emphatically recognized "exemplary damages" as lawful. (*g*) And we are not aware of any authoritative

(*yy*) See vol. 1, p. 551, note, (*i*).

(*z*) There are numerous English cases in which it has been held that juries may give exemplary damages; — as in trespass for assault and imprisonment under a general warrant issued by the Secretary of State, Huckle *v.* Money, 2 Wils. 205; — in trespass *quare clausum fregit* for entering the plaintiff's land, firing at game, and using intemperate language, Nurest *v.* Harvey, 5 Taunt. 442; — in trespass *quare clausum fregit* for entering the plaintiff's close, and poisoning the plaintiff's poultry, Sears *v.* Lyons, 2 Stark. 317; — in trespass for debauching the plaintiff's daughter, Sullidge *v.* Wade, 3 Wils. 18. In Doe *v.* Filliter, 13 M. & W. 75, it was said; "In actions for malicious injuries, juries have been allowed to give vindictive damages and to take all the circumstances into consideration." In Brewer *v.* Dew, 11 M. & W. 625, it was held that vindictive damages might be given in an action of trespass, for seizing the plaintiff's goods under a false and unfounded claim, whereby he was prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house.

(*a*) Sinclair *v.* Tarbox, 2 N. H. 135; Whipple *v.* Walpole, 10 Id. 130.

(*b*) Linsley *v.* Bushnell, 15 Conn. 225; Huntley *v.* Bacon, 15 Id. 273.

(*c*) Tillotson *v.* Cheetham, 3 Johns. 56; Woert *v.* Jenkins, 14 Id. 352; King *v.* Root, 4 Wend. 113, 139; Brizsee *v.* Maybee, 21 Wend. 144, where exemplary damages were allowed in an action of replevin; Lifft *v.* Culver, 3 Hill, 180; Kendall *v.* Stone, 2 Sandf. 269. See able argument of counsel in Kendall *v.* Stone, 1 Selden, 14.

(*d*) Sommer *v.* Wilt, 4 Serg. & R. 19; McBride *v.* McLaughlin, 5 Watts, 375; Phillips *v.* Lawrence, 6 W. & S. 154; Amer *v.* Longstreth, 10 Penn. St. 148.

(*e*) Donnell *v.* Jones, 13 Ala. N. S. 490, 502; Ivey *v.* McQueen, 17 Id. 408; Mitchell *v.* Billingsley, 17 Id. 391.

(*f*) Neilson *v.* Morgan, 2 Martin, (La.) 256; Gaulden *v.* McPhaul, 4 La. Ann. 79. Exemplary damages are also allowed in Kentucky; Jennings *v.* Maddock, 8 B. Mon. 430; — in Illinois, Grable *v.* Margrave, 3 Scam. 372; McNamara *v.* King, 2 Gilman, 432; — in North Carolina, Wylie *v.* Smitherman, 8 Iredell, 236: Gilreath *v.* Allen, 10 Iredell, 67; — in South Carolina, Spikes *v.* English, 4 Strobhart, 34; — in Delaware, Steam Boat Co. *v.* Whillden, 4 Harrington, 228; Jefferson *v.* Adams, 4 Id. 321; Cummins *v.* Pusley, 4 Id. 315; — in Missouri, Milburn *v.* 14 Missouri, 104.

(*g*) In Day *v.* Woodworth, 13 Howard, 363, the action was trespass for pulling down a mill-dam. *Grier*, J., in delivering the opinion of the court said:

and direct judicial decision, which declares that such damages are never lawful. But, at the same time, we think there is a growing caution as to the application of this rule, and, perhaps, a tendency to restrict it to cases in which the direct criminal process fails wholly or in a good degree, and not to allow it to justify an excessive and unreasonable enlargement of damages. (*h*)

'It is a well-established principle of the common law, that in actions of trespass, and all actions upon the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been question by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct, or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary, or vindictive, rather than compensatory. In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, courts permit the juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further, by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." See also Conard *v.* Pacific Ins. Co. 6 Peters, 262; Walker *v.* Smith, 1 Wash. C. C. 152; Boston Manuf. Co. *v.* Fiske, 2 Mason, 120; Stimpson *v.* The Railroads, 1 Wallace, Jr. 164; Ralston *v.* The State Rights, 1 Crabbe, (Dist. Ct. Penn.) 22.

(*h*) In Austin *v.* Wilson, 4 Cush. 273, it was held that exemplary damages could not be recovered in an action for an injury which is also punishable by indictment. *Metcalf*, J., in delivering the opinion of the court said: "Whether exemplary, vindictive, or punitive damages — that is, damages beyond a compensation, or satisfaction for the plaintiff's injury — can ever be legally awarded, as an example to deter others from committing a similar injury, as a punishment of the defendant for his malignity or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required or disposed to express an opinion. The argument and the authorities on both sides of this question are to be found in 2 Greenl. on Ev. tit. Damages, and Sedgwick on Damages, 39, *et seq.* If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel, and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. See Thorley *v.* Lord Kerry, 4 Taunt. 355; Whitney *v.* Hitchcock, 4 Denio, 461; Taylor *v.* Carpenter, 2 Woodb. & Min. 1, 22." But in Cook *v.* Ellis, 6 Hill, 466; Jefferson *v.* Adams, 4 Harrington, 321, vindictive damages were allowed, although the defendants had been indicted and fined for the same injury. See Jacks *v.* Bell, 3 Car. and Payne, 316. In Whitney *v.* Hitchcock, 4 Denio, 461, it was held that in trespass for assault and battery upon the child or servant of the plaintiff, the measure of damages is the actual loss which the plaintiff has sustained; and exemplary damages cannot be given, though the assault be of an indecent character, upon a female, and under circumstances

There is, however, a difficulty, as well as a great difference among the courts, in their practice in relation to verdicts which are alleged to be excessive. In those cases in which compensative damages may be ascertained within narrow limits, by computation, it is easy to say when these limits are certainly exceeded. And generally, in these cases, and in actions upon contract, or on tort, when no actual bad motive is relied upon, it is for the court to direct the jury in what way, or by what rule or measure, they should assess the damages. But there are cases which seem to justify the remark sometimes made in them by the courts, that there is no rule by which the damages can be measured, and they must be left to the discretion of the jury. (*i*) And in such

of great aggravation. The court said; "The present suit is brought for the loss of the services of his servant, which the plaintiff says he has sustained in consequence of the injury which the defendant has inflicted upon her. This he is entitled to recover; and if sickness had followed, he could have claimed to be reimbursed for the expenses attending such sickness; but we all think that he cannot recover beyond his actual loss. The young female can herself maintain an action, in which her damages may be assessed according to the rule laid down at the trial; and if the father could likewise recover them in this case, they could be twice claimed in civil actions, and the defendant would also be liable to indictment. The action for seduction is peculiar, and would seem to form an exception to the rule, that actual damages only can be recovered, where the action is for loss of service consequential upon a direct injury; but there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded upon special reasons only applicable to that case." In Rippey *v.* Miller, 11 Iredell, 247, it was held, under a statute enacting that all actions of trespass and trespass on the case shall survive, when they are not merely vindictive; that in an action against the representatives of one deceased, who had committed a trespass upon the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages. In Amer *v.* Longstreth, 10 Penn. St. 145, it was held, in an amicable action of trespass instituted to try the rights of the parties, that the damages must be measured by the actual injury, although there might have been a wanton invasion of the plaintiff's rights. In Singleton *v.* Kennedy, 9 B. Mon. 222, it was held that in an action on the case for fraud, in the sale of personal property, the jury were not authorized to assess vindictive damages. But see Spikes *v.* English, 4 Strobh. 34. In Barnard *v.* Poor, 21 Pick. 378, it was held, in an action on the case against the defendant, for carelessly and negligently setting fire on his own land, whereby the plaintiff's property on adjoining land was destroyed, that it was not material whether the proof established *gross negligence* or only want of ordinary care, for in either case the plaintiffs would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise. But in Whipple *v.* Whipple, 10 N. H. 130, it was held that in cases of gross negligence exemplary damages might be recovered.

(*i*) In Berry *v.* Vreeland, 1 N. J. 183, *Green*, C. J., in delivering the opinion of the court in an action of trespass *quare clausum fregit*, said: "The court, in actions of trespass, especially for personal torts, when damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages, with reluctance, and never except in a clear case. But when the plaintiff complains of no injury to his person or his feelings — where no malice is shown —

cases a verdict would not be disturbed for excess, unless it indicated wilful perversity, or blinding prejudice or passion, or an entire misapprehension of the merits of the case and the duty of a jury. (*j*)

From all injuries the law implies that damages are sustained. If the injury be nothing more than the invasion of a legal right, the law, usually at least, implies nothing more than nominal damages, for these suffice to determine the question of right, and more will not be given unless actual injury be shown. But the actual injuries need not always be set forth in the declaration. If the injury be one from which actual loss, suffering or mischief must *necessarily* ensue, this the law will generally infer, and it need not be specifically alleged. But that which occurs directly, yet not necessarily and as a certain or inevitable consequence, should, as a general rule,

where no right is involved beyond a mere question of property—where there is a clear standard for the measure of damages, and no difficulty in applying it — the measure of damages is a question of law, and is necessarily under the control of the court." See also Leland *v.* Stone, 10 Mass. 462, per *Jackson*, J.; Ferrand *v.* Bouchell, Harper, (So. Car.) 87; Alder *v.* Keighley, 15 M. & W. 117; Walker *v.* Smith, 1 Wash. C. C. 152; Wylie *v.* Smitherman, 8 Iredell, 236; Commonwealth *v.* Sessions of Norfolk, 5 Mass. 437, per *Parsons*, C. J.

(*j*) Huckle *v.* Money, 2 Wils. 205; Sharp *v.* Price, 2 W. Bl. 942; Williams *v.* Currie, 1 C. B. 841; Cook *v.* Hill, 3 Sandf. 331; Woodruff *v.* Richardson, 20 Conn. 238. In Huckle *v.* Money, 2 Wils. 206, *Pratt*, C. J., said: "The law has not laid down what shall be the measure of damages in actions of *tort;* the measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances; *torts* or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c., the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are considered by the jury in giving damages; the few cases to be found in the books of new trials for torts, show that courts of justice have most commonly set their faces against them. . It is very dangerous for the judges to intermeddle in damages for *torts;* it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." The same rule is acted upon by the courts in actions for breach of promise to marry. Clark *v.* Pendleton, 20 Com. 495; Perkins *v.* Hersey, 1 R. I. 495. But in all these cases, new trials are granted if the damages are clearly excessive. Chambers *v.* Robinson, 2 Strange, 691; Price *v.* Severn, 7 Bing. 316; Boyd *v.* Brown, 17 Pick. 453; McConnell *v.* Hampton, 12 Johns. 234; Wiggins *v.* Coffin, 3 Story, 1; Collins *v.* The A. & S. R. R. Co. 12 Barb. 492; Dublin *v.* Murphy, 3 Sandf. 19. In Sharp *v.* Brice, 2 W. Bl. 942, *De Grey*, C. J., said: "It has never been laid down that the court will not grant a new trial for excessive damages in any case of *tort*. It was held so long ago as in Comb. 357, that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly — that the same rule does not prevail upon questions of *tort*, as of contract. In contract the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in *torts* a greater latitude is allowed to the jury, and the damages must be excessive and outrageous to require or warrant a new trial."

be specifically stated, and then, being proved, damages may be founded upon it. (*k*) Thus, if one who owes money refuses to pay it, the creditor may sue and declare himself damaged, without specifying in what way, because the law understands that when one cannot get money which is due to him, he must sustain loss. So, if in slander, the words charge an indictable offence, or a contagious disease, or impute insolvency to a merchant, the plaintiff need not here say in what way he is damaged, for the law asserts that such slander as this must be injurious. (*l*) But if the words charged are of other matters, and the defamation may or may not have been injurious, the plaintiff must now set forth specifically the damages he has sustained, and either prove them as alleged, specifically, or prove facts from which the jury may infer them. (*m*) These damages are called special damages. They are such consequences of the injury as are both actual and natural, but not necessary.

(*k*) 1 Chitty's Pl. 332; Stevens *v.* Layford, 7 N. H. 360; Furlongs *v.* Polleys, 30 Maine, 491; Bedel *v.* Powell, 13 Barb. 183. In Vanderslice *v.* Newton, 4 Comst. 130, the action was for a breach of a contract to tow the plaintiff's boat. *Ruggles*, J., in delivering the opinion of the court said: "With respect to the damages, the general rule in questions of this nature is, that the plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of. (2 Greenl. Ev. § 256.) Those which *necessarily* result from the injury are termed general damages, and may be shown under the general allegation of damages, at the end of the declaration. But such damages as are the natural, although not the necessary result of the injury, are termed special damages, and must be stated in the declaration, to prevent a surprise upon the defendant; and being so stated may be recovered."

(*l*) Bacon's Abr. Tit. Slander, (B); 1 Stark. on Slander, 10. See Whittemore *v.* Cutter, 1 Gall. 429; per *Story*, J., Sevan *v.* Lappan, 5 Cush. 104.

(*m*) Bacon's Abr. Tit. Slander, (C.) In Beach *v.* Ranney, 2 Hill, 309, it was held that such damages must be *pecuniary*, and that proof of mere mental or bodily suffering, loss of society, or of the good opinion of neighbors, would not be sufficient. But it has been held, that a refusal to receive the plaintiff as a visitor, on account of the slander, was sufficient evidence to support an allegation of special damage. Moore *v.* Meagher, 1 Taunt. 39; Williams *v.* Hill, 19 Wend. 305. So where the plaintiff was refused civil treatment at a public house; Olmstead *v.* Miller, 1 Wend. 506. In Bradt *v.* Towsley, 13 Wend. 253, the plaintiff having been called a prostitute, brought her action of slander, alleging, as special damage, loss of health, and a consequent derangement of business; the defendant demurred, and there was judgment on the demurrer for the plaintiff. See also Hartley *v.* Herring, 8 T. R. 130.

SECTION V.

OF DIRECT, OR REMOTE, CONSEQUENCES.

Damages will not, in general, be given for the consequences of wrongdoing, which are not the natural consequences, because it is only for them that the defendant is held liable. Thus, if he has beaten the plaintiff, he must compensate for all the evils which naturally flow from the beating, whatever they may be; but if a slight bruise has been so ill-treated by a surgeon, that extensive inflammation and gangrene have supervened and a limb is lost, the defendant is not answerable for this. Nor, on the same principle, ought he to be held responsible if the same consequences follow from a slight bruise, by reason of the peculiarly unhealthy condition of the plaintiff, if the defendant had no means of knowing this. Still, it is sometimes difficult to draw the line between what are and what are not the natural consequences of an injury. Always, however, if the consequences of the act complained of have been increased and exaggerated by the act, or the omission to act, of the plaintiff, this addition must be carefully discriminated from those natural consequences of the act of the defendant, for which alone he is responsible. If the plaintiff chooses to make his loss greater than it need have been, he cannot thereby make his claim on the defendant any greater. (*n*)

(*n*) Miller *v.* Mariner's Church, 7 Greenl. 51; Davis *v.* Fish, 1 Greene, (Iowa) 406; Dowin *v.* Potter, 5 Denio, 306. In Loker *v.* Damon, 17 Pick. 284, the action was trespass for removing a few rods of fence, and it was held that the proper measure of damages was the cost of repairing it, and not the injury to the crop of the subsequent year, arising from the defect in the fence, it appearing that such defect was known to the plaintiff. *Shaw*, J. C., said: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and willfully, and obstinately; or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window,

It is an ancient and universal rule, resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate, and not for the remote consequences of his actions. One does not pay money which is due; the creditor, in his reliance on this payment, has made no other arrangements; he is therefore unable to meet an engagement of his own; his credit suffers, his insolvency ensues, and he is ruined. All this is distinctly traceable to the non-payment of his debt by the defendant; yet he shall be held liable only for its amount and interest; *causa proxima, non remota, spectatur;* and the proximate cause of the plaintiff's insolvency was his non-payment of the debt he himself owed. The cause of this cause was the defendant's failure to pay his debt. But this was a remote cause, being thrown back by the interposition of the proximate cause. (*o*) In such a case as this the reason of the rule is plain enough. If every one were answerable for all the consequences of all his acts, no one could tell what were his liabilities at any moment. The utmost caution would not prevent one who sustained any social relations from endangering all his property every day. And as very few causes continue to operate long without being combined and complicated with others, it would soon become impossible to say which of the many persons who may have contributed to a distant result should be held responsible for it, or in what proportions all should be held.

We must then stop somewhere; but the question where we shall stop is sometimes one of great uncertainty. Not only is there no definite rule, or clear and precise principle given by which we may measure the nearness or remoteness of effects in this respect; but the highest judicial authorities are so directly antagonistic, that they scarcely seem as guides to lead us to a conclusion. For example, the Court

this damage would be too remote." But see Heaney *v.* Heeney, 2 Denio. 625; Green *v.* Mann, 11 Illinois, 613. So in actions for personal injuries, evidence is admissible in mitigation of damages, to show that the plaintiff provoked the injury, or otherwise brought it upon himself. Fraser *v.* Berkeley, 7 C. & P. 621; Watts *v.* Freser, 7 Id. 369; Calcraft *v.* Harborough, 4 C. & P. 499. But the provocation must have been so recent as to induce a presumption that the injury was inflicted under the influence of it. Lee *v.* Woolsey, 19 Johns. 319.

(*o*) Archer *v.* Williams, 2 C. & K. 26.

of King's Bench, and the Supreme Court of the United States decide this question as it is presented to them in circumstances of almost exact similarity, in precisely opposite ways. (*p*) We have been disposed to think that there is a principle, derivable on the one hand from the general reason and justice of the question, and, on the other hand, applicable as a test, in many cases, and, perhaps, useful, if not decisive in all. It is that every defendant shall be held liable for all of these consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration. (*q*) There seems little reason to object to this rule in cases where the act complained of was voluntary and intentional. And if it be said that where the act is wholly involuntary, as where the defendant's ship runs down another at anchor, in a dark night, there is no reason for asking what consequences he should have expected, when he had not indeed the least thought of doing the thing itself, it may be answered that even here it will generally be found, that the consequences which at the time would have been foreseen, by a person of intelligence and deliberate observation, are just those which are so far the direct, immediate, and natural effects of the act, that the doer of the act

(*p*) An insured vessel, having sunk another vessel, by accidental collision, was sentenced by a foreign Admiralty Court, (acting on a peculiar local law) to pay one half the value of the lost vessel. It was held, in Peters *v.* The Warren Ins. Co., 3 Sumner, 389, S. C. 14 Peters, 99, that a peril of the sea was the proximate cause of the loss of the sum thus paid, and that the insurers were liable for it. The very same point arose about the same time in the Court of King's Bench, and received a directly opposite adjudication. De Vaux *v.* Salvador, 4 Ad. & Ellis, 420. And on this question we cannot but prefer the reasons and conclusions of the English court. The maxim, *causa proxima, non remota, spectatur*, may be applied with more strictness to contracts of insurance, than in questions respecting damages, but the difficulty and uncertainty in its application are equally great in both cases.

(*q*) Greenland *v.* Chaplain, 5 Exch. 243. In Rigby *v.* Hewitt, 5 Exch. 240, an action on the case was brought for an injury to the plaintiff, from the negligent driving of the defendant's omnibus. *Pollock*, C. B., in giving the opinion of the court, said: "I am disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct." This rule appears where contracts are broken, without fraud or malice. Pothier on Obligations, (by Evans,) Part. 1, c. 2, art. 111, p. 9. See Williams *v.* Barton, B. La. 410.

ought, on the general principles of common justice, to be held responsible for them. But it is difficult, and perhaps impossible, to lay down a definite rule, which shall have great practical value or efficacy in determining for what consequences of an injury a wrongdoer is to be held responsible. (*r*)

(*r*) In Harrison *v.* Berkley, 1 Strobh. 548, *Wardlaw*, J., said: "Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate rather than seriously blameable, cannot be made answerable for all these consequences. He shall not answer for those which the party grieved has contributed by his own blamable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented. (Conn. Dig. action on the case, 134; 11 East, 60; 2 Taunt. 314; 7 Pick. 284.) But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequence shall be answered for. (2 Greenleaf's Ev. 210, and cases there cited.) The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be, would often depend upon the power of the microscope with which we should regard the affair." The general character of the adjudications upon the subject may be gathered from the following cases. In Astley *v.* Harrison, 1 Esp. 48, Peake, 194, a performer employed by the plaintiff was libelled by the defendant, and in consequence refused to appear upon the stage. It was alleged as special damage that the oratorios had been more thinly attended on that account. It was held that the injury was too remote, and, per Lord *Kenyon*, "If this action is to be maintained I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress." See also Moore *v.* Adam, 2 Chitty, 198; Boyle *v.* Brandon, 13 M. & W. 728; Lincoln *v.* The S. & S. R. R. Co. 23 Wend. 425; Donnell *v.* Jones, 13 Ala. 490. It was held that an action for slanderous words not in themselves actionable could not be maintained on the ground that injury resulted from the repetition of these words by a third person. Ward *v.* Weeks, 7 Bing. 211; Stevens *v.* Hartwell, 11 Mete. 542. In Vicars *v.* Wilcocks, 8 East, 1, the defendant asserted that his cordage had been cut by the plaintiff, in consequence of which the latter, who was hired for a time certain, was discharged from employment by his master. It was held that the defendant was not liable for damages caused by the discharge, and, per Lord *Ellenborough*, "The special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, then if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond, by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by the tortious act of a third person." See also Morris *v.* Langdale, 2 B. & P. 284, 289; Cram *v.* Petrie, 6 Hill, 522; Kendall *v.* Stone, 1 Selden, 14. But the decision in Vicars *v.* Wilcocks has been questioned, in 1 Stark. Slander, 205–207; Green *v.* Button, 2 C. M. & R. 707; Coppin *v.* Brathwaite, 8 Jur. 876, per *Parke*, B.; and in Keene *v.* Dilke, 4 Exch. 388, it was held that, "if a sheriff

Both in England and America, it is generally held that profits are not to be included in the injury for which compen-

wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the sheriff, recover as special damage the amount necessarily paid to the other wrongdoer, in order to get back the goods." But *Alderson*, B., distinguished the case from Vicars *v.* Wilcocks, by remarking that "in Vicars *v.* Wilcocks there was no cause of action without special damage. Here it is only a question as to the amount of damages." See also Moody *v.* Baker, 5 Cowen, 351. In actions for a breach of warranty this question has arisen. In Borradaile *v.* Brunton, 8 Taunt. 535, 2 J. B. Moore, the defendant sold the plaintiff a chain cable, warranted to last two years, as a substitute for a rope cable of sixteen inches. Within two years the cable broke and was lost, together with the anchor attached to it. It was held, in an action for breach of the warranty, that the value of both the cable and anchor could be recovered. In Hargous *v.* Ablon, 5 Hill, 472, the defendant sold cloth, warranting the invoice to be correct: it proved to be much overstated, and in consequence the duties on the cloth, when exported to a foreign market, were overpaid. It was held, in an action for breach of the warranty, that the excess of duties could not be recovered as damages. *Cowen*, J., said, "The only question before us, therefore, relates to the amount of damages recoverable. The general rule would stop with awarding to the plaintiff so much only as would make good the difference between the price paid and the value which the article fell short in consequence of the warranty being broken. A warranty or promise concerning a thing being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity against its breach. (See Blanchard *v.* Ely, 21 Wend. 342, 347, 348; Voorhees *v.* Earl, 2 Hill, 288, 291, a.) The exceptions will all be found to lie in the special nature of the promise or warranty itself, express or implied. Thus, in the case of Borradaile *v.* Brunton, (2 J. B. Moore, 82) mentioned at the bar and mainly relied on for the plaintiff, the warranty was, that a cable should last two years. It failed before, in consequence of which the anchor was lost. The plaintiff was allowed to recover, not only for the cable, but the anchor; the court saying the loss of the last was consequential to the insufficiency of the cable. Where goods are purchased for a particular market, and that known to both parties, the damages have been governed by the price of that market. (Bridge *v.* Wain, 1 Stark. Rep. 410.) But where the warranty is general, an accidental damage even in the vendee's own affairs is not regarded." See also Langridge *v.* Levy, 2 M. & W. 519, 4 Id. 337. In an action by a lessee against his lessor, for refusing to allow the lessee to enter upon the demised premises, the plaintiff is entitled to recover the damage sustained by him in his removal to the premises. Driggs *v.* Dwight, 17 Wend. 71; Giles *v.* O'Toole, 4 Barb. 261; Johnson *v.* Arnold, 2 Cush. 46; Lawrence *v.* Wardwell, 6 Barb. 423. Although the injury may have been inflicted by the immediate agency of a third person, the wrongdoer will be liable if his wrongful act naturally led to the injury; as where the defendant descended in a balloon into the plaintiff's garden, and drew to his assistance a crowd, who trod down the vegetables and flowers, the defendant was held liable for these injuries. Guille *v.* Swan, 19 Johns. 381; Scott *v.* Shepherd, 2 W. Bl. 892; Vandenburgh *v.* Swax, 4 Denio, 464; so also if caused by the act of a horse; Gilbert *v.* Richardson, 5 C. B. 502. See also Lynch *v.* Nurdin, 1 Q. B. 29. A lapse of time may intervene between the wrongful act and the injury; Dickinson *v.* Bayle, 17 Pick. 78. In Tarleton *v.* McGawley, Peake, 205, the defendant was held liable for firing cannon at the natives on the coast of Africa, to prevent their trading with the plaintiff. Firing near the plaintiff's decoy pond, to frighten away the wild fowl, was held actionable, in Keeble *v.* Hickeringall, 11 East, 574, *note*. In Watson *v.* A. N. & B. Railway, 3 E. L. & Eq. 497, 15 Jur. 448, the plaintiff sent a plan and model to a committee who had offered a prize for the best one of the kind. By the negligence of the common-carrier it did not arrive in

sation is to be made. Yet these would seem to be precisely those consequences which the owner of merchandise did expect, and the loss of them would be that which one who interfered with the owner, as by unlawful capture, must have contemplated as certain. But the answer is, that profits are excluded, not because they are in themselves remote, but because they depend wholly upon contingencies, which are so many, so various, and so uncertain; as the arrival of goods, the time, place, and condition of arrival, the state of the market at that moment, and the like, that it would be impossible to arrive at any definite determination of the actual loss, by any trustworthy method. And the future profits of a business which has been interrupted by the defendant, are open also to the objection of remoteness as well as uncertainty. (*s*) But

season to be presented. It was held, that the chance of obtaining the prize could not be considered in assessing the damages. Where the plaintiff's horses escaped into the defendant's field, in consequence of a defect in his fence, and were there killed by the falling of a haystack, which it was alleged was kept in an improper and dangerous manner, the defendant was held liable for the loss of the horses. Powell *v.* Salisbury, 2 You. & Jerv. 391. The expense of searching for property wrongfully taken has been held recoverable as special damage, in an action on the case for the taking of the property. Bennett *v.* Lockwood, 20 Wend. 223.

(*s*) The probable profits of a voyage have not been allowed as damages, when it has been broken up by the illegal capture of the vessel,—The schooner Lively, 1 Gallison, 315, 325; The Amiable Nancy, 3 Wheat. 546, 560; La Amistad de Rues, 5 Wheat. 385; or by a collision occasioned by the fault of the defendant; Fitch *v.* Livingston, 4 Sandf. 492, 514; Cummins *v.* Presley, 4 Harrington, 315; Steamboat *v.* Whilldin, 4 Id. 233; Finch *v.* Brown, 13 Wend. 601; or by illegal attachment of the ship; Boyd *v.* Brown, 17 Pick. 453. In Smith *v.* Condry, 1 How. 28, 35, *Taney*, C. J., said: "It has been repeatedly decided, in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party, at the time and place of the injury, that is the measure of damages." But see Wilson *v.* Y. N. & B. R. Co. 18 Eng. L. & Eq. 557. But in The Narragansett, 1 Blatchford, 211, (a case in admiralty,) the value of the services of the vessel, while undergoing necessary repairs for injuries received by collision, was allowed as a part of the damages sustained by her owners. It was held, in an action by the builder of a steamboat for its price, that the owner could not recoup the amount of profits which would probably have arisen from trips, which were prevented by defects in the construction of the boat. Blanchard *v.* Ely, 21 Wend. 342. See Taylor *v.* Maguire, 13 Missouri, 517. In an action against a lessor, for refusing to allow the lessee to enter upon the demised premises, the profits which the lessee might have made in his business, had he occupied the premises, cannot be recovered as damages. Giles *v.* O'Toole, 4 Barb. 261. In an action for the breach of a contract to make and deliver certain machinery within a certain time, the profits which might have accrued from the manufacture of an article with the machinery, had the contract not been broken, can not be considered in estimating the profits. Freeman *v.* Clute, 3 Barb. 424. But in Waters *v.* Towers, 20 Eng. L. & Eq

where profits are not liable to either of these objections, there they should be admitted, as giving a right to compensation in damages. This admission seems, however, in general, to be limited to cases in which the profits are the immediate fruit of the contract, and are independent of any collateral engagement or enterprise, entered into in expectation of the performance of the principal contract. (*t*) In some instances,

410, where the action was for the non-fulfilment of a contract to furnish machinery in a reasonable time, it was held that the jury might assess damages for loss of profits to be derived from contracts with third parties, if the jury believed that such profits would have been obtained. But the loss of profits was set forth in the declaration. A vendee of property cannot recover against the vendor, in an action for a breach of the contract to sell, damages on account of an advantageous contract of resale, made by the vendee with a third person. Lawrence *v.* Wardwell, 6 Barb. 423. But evidence of the amount of probable profits, has sometimes been admitted, not as a measure of damages, but to aid the jury in estimating the loss. McNeil *v.* Reed, 9 Bing. 68; Ingram *v.* Lawson, 6 Bing. N. C. 212; Donnell *v.* Jones, 17 Ala. 689.

(*t*) Thus where a party refuses to fulfil a contract, the other party may recover as damages the difference between the sum he was to be paid for performing it and what it would have cost him to complete it. In Masterton *v.* Mayor of Brooklyn, 7 Hill, 61, the plaintiffs agreed to furnish the marble necessary for a public building, at a specified sum. The defendants suspended operations, and the plaintiffs were thereby prevented from furnishing the full amount. An action of covenant was brought. *Nelson*, C. J., said: "When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the measure of damages, they usually have relation to dependent and collateral engagements, entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and often doubtless does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. . . . . The contract here is for the delivery of marble wrought in a particular manner, so as to be fitted for use in the erection of a certain building." The plaintiff's claim is substantially one for not accepting goods bargained and sold; as much as if the subject-matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule, grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value of the articles, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it, becomes necessary; and that compared with the contract price will afford the measure of damages." See Fox *v.* Harding, 7 Cush. 516. The N. Y. & H. R. Co. *v.* Story, 6 Barb. 419; Lawrence *v.* Wardwell, 6 Id. 243; Seaton *v.* The Second Municipality, 3 La. Ann. R. 45. The principle laid down in Masterton *v.* Mayor of Brooklyn, was

the courts have gone so far, in effect, as to allow, as damages, the amount of the profits which would probably have arisen from contracts that depended upon the performance of the principal contract. (*u*)

The general principle as to remoteness has been applied to cases where sureties were put to extraordinary loss and inconvenience, on account of the obligations of their suretyship; and it is held that they can recover only what they have paid, with interest, and necessary expenses. (*v*) As a general rule, a surety for the payment of money cannot sue his principal until he pays the debt. (*w*) And if there be no express contract between the principal and surety, it would seem that the only remedy for the latter is assumpsit for money paid, in which only the money actually paid, with

approved in the Supreme Court of the United States, in P. W. & B. R. R. Co. *v.* Story, 13 Howard, 307. *Curtis*, J., in delivering the opinion of the court said: "Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he spends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value, or cost. See Masterton *v.* Mayor of Brooklyn, 7 Hill, 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit of which the contractor was deprived, by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

(*u*) In Clifford *v.* Richardson, 18 Vermont, 620, the defendant put machinery into the plaintiff's mill in an unskillful manner, whereby he lost the use and profit of the mill for a long space of time, and was put to great expense in repairing the machinery. It was held that both the loss of the use of the mill, and the expense of repairs, were to be compensated for in damages. See Green *v.* Mann, 11 Illinois, 613; White *v.* Moseley, 8 Pick. 356. In Thompson *v.* Shattuck, 2 Mete. 615, the defendant had covenanted to keep in repair half of the plaintiff's mill-dam; it was held that a loss of profits occasioned by a delay in repairing could not be recovered, as the plaintiff might have made the repairs immediately, at the defendant's expense. But see Blanchard *v.* Ely, 21 Wend. 342, *supra*, n. (*s*.)

(*v*) In Hayden *v.* Cabot, 17 Mass. 169, the action was assumpsit, by a surety against his principal, on a written promise of indemnity. *Parker*, C. J., said, "The common construction of such a contract is, that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt. But extraordinary expenses, which might have been avoided by payment of the money, or remote, and unexpected consequences, are never considered as coming within the contract."

(*w*) Taylor *v.* Mills, Cowp. 525; Powell *v.* Smith, 8 Johns. 249.

interest, can be recovered. But the principal may give to the surety a distinct promise to pay money or do some specific act, and then the surety may have an action before he pays anything for his principal. Thus, if one is surety for another, who is bound to pay a third party a certain sum at a certain time, and the principal promises the surety that he will pay that sum at that time, so as to discharge the surety, if he fails to pay it so that the surety becomes liable, the surety may recover from the principal on his promise, before the surety pays the debt; (*x*) and if the principal agree with the surety to pay the debt at a certain time, and fail to pay it at that time, the surety may thereupon recover the whole amount of the debt without showing any actual damage. (*y*) If the promise of the principal to the surety be only to indemnify and save him harmless, it seems that if the surety sees fit to bring an action on this promise, before paying the debt of the principal, he cannot maintain it, unless he can show that he has given his own notes, or made other arrangements in the way of acknowledging and securing the debt, which are equivalent to its payment. From the current of authority, and from reason, it may be regarded as a general rule, if not an universal one, that where one's obligation, whether express and voluntary, or implied, or created by law, is only indirect and collateral, there is no cause of action, or at least no right to recover actual compensation, unless there has been an actual damage arising from an actual discharge of the obligation. (*z*)

(*x*) Cutler *v.* Southern, 1 Wm's. Saund. 116, n. (1); Holmes *v.* Rhodes, 1 B. & P. 638; Hodgson *v.* Bell, 7 Term. R. 97; Port *v.* Jackson, 17 Johns. 239; Thomas *v.* Allen, 1 Hill, 145; Churchill *v.* Hunt, 3 Denio, 321; Gilbert *v.* Wiman, 1 Comst. 550; Lathrop *v.* Atwood, 21 Conn. 117.

(*y*) Loosemore *v.* Radford, 9 M. & W. 657; *Ex parte* Negus, 7 Wend. 499; Churchill *v.* Hunt, 3 Denio, 321; Lethbridge *v.* Mytton, 2 B. & Ad. 772; Port *v.* Jackson, 17 Johns. 239.

(*z*) Gilbert *v.* Wiman, 1 Comst. 550; Rodman *v.* Hedden, 10 Wend. 498. In Lathrop *v.* Atwood, 21 Conn. 117, 123, *Church*, C. J., said: "We think an examination of the cases will show these reasonable doctrines; that, if a condition, covenant, or promise, be only to indemnify and save harmless a party from some consequence, no action can be sustained for the liability or exposure to loss, nor until actual damage, capable of appreciation and estimate, has been sustained by the plaintiff. But if the covenant or promise be, to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of nonperformance, the neglect to perform the act, being a breach of contract, will give an immediate right of action."

SECTION VI.

OF THE BREACH OF A CONTRACT THAT IS SEVERABLE INTO PARTS.

It may happen that the injury complained of is the breach of a contract that extends over a considerable space of time, and includes many acts; or it is a tort divisible into many parts. The question then arises whether the action should be for the whole breach or the whole tort, and damages be given accordingly. This must depend upon the entirety of the contract, or of the tort. If it be a whole, formed of parts which are so far inseparable that if any are taken away there is no completed breach or tort left, all must be included in the demand and in the damages. (*a*) But if they are separable into many distinct breaches or torts, then an action may be brought as if each stood alone, and damages recovered. (*b*)

(*a*) Hambleton *v.* Veere, 2 Saund. 170, note; Masterton *v.* The Mayor of Brooklyn, 7 Hill, 61. In Shaffer *v.* Lee, 8 Barb. 412, after an elaborate review of the cases, it was held, that a bond conditioned to furnish to the obligee and his wife all necessary meat, drink, lodging, washing clothes, &c., during both and each of their natural lives, was an entire contract, and that a failure by the obligor to provide for the obligee and his wife, according to the substance and spirit of the covenant, amounted to a total breach; and that full and final damages should be recovered, for the future as well as the past. In Royalton *v.* The R. & W. Turnpike Co. 14 Verm. 311, the defendants agreed to keep a bridge in repair for twenty years, on the plaintiff's paying them twenty-five dollars a year. The money was paid and the bridge kept in repair according to the agreement for eight years, when the defendant ceased to repair, and the action was then brought. *Redfield*, J., said, that the jury should "assess the entire damages for the remaining twelve years." See our remarks on entirety of contracts, with the notes, pp. 29–32, vol. 2.

(*b*) Crain *v.* Beach, 2 Barb. 120; Bristowe *v.* Fairclough, 1 M. & G. 143; Clark *v.* Jones, 1 Denio, 516; Puckell *v.* Smith, 5 Strobh. 26; *supra*, note (*a*), and cases cited. In Crain *v.* Beach, 2 Barb. 120, the defendants had covenanted to keep a certain gate in repair, and to use common care in shutting it, and in passing and repassing the same; it was held, that if the gate should be suffered to be out of repair, or should be allowed to remain open by the defendants, the damages in an action for the breach of their covenant would be determined by the amount of the plaintiff's loss, by means of the breach proved on the trial of the cause, and that the recovery thereof would be no bar to a future action for a renewed breach of the covenant. S. C., in Error, 2 Comst. 86. *Wright*, J., said: "To constitute an effectual bar, the cause of action in the former suit, should be identical with that of the present. It is the same cause of action where the same evidence will support both the actions, although they happen to be grounded on different writs. Rice *v.* King, 7 Johns. 20. But the evidence in both actions may be *in part* the same; yet the subject-matter essentially different, and in such case there is no bar. For example, if money be awarded to be paid at different times, assumpsit will lie on the award for each sum as it becomes due. So on an agreement to pay a sum of money by instalments, an action will lie to recover each instalment as it becomes due. In covenant for non-payment of rent, or of an annuity payable at different times,

There would seem, however, to be this qualification to this rule. If there are many parts of the contract, and some have been broken, and others not yet; as if money was to be paid on the first of every month for two years, and one year has expired and nothing has been paid, the creditor may bring his action for one or more of all the sums due, and recovering accordingly, may, when the others fall due and are unpaid, sue for them. (*c*) But if at any time he sues for a part only of the sums due, a judgment will be held to be satisfaction of all the sums which could have been included in that action, and were due and payable by the terms of that contract; and therefore no further suit can be maintained on any of them. (*d*) The reason for this rule is the prevention of unnecessary and oppressive litigation. And it would doubtless be regarded in actions founded on tort, whenever it was distinctly applicable to them.

the plaintiff may bring a new action *toties quoties*, as often as the respective sums become due and payable; yet in each of these examples, the evidence to support the different actions is in part the same. In this case the same covenant was the foundation of both actions; the same evidence, therefore, in part, is alike common to both; but there is this difference; in the former suit the breach was assigned, and the actual damages laid as having accrued prior to the commencement thereof; in the present, damages are sought to be recovered for a breach subsequent to such former action. In the present action the plaintiff could not have recovered for damages that had accrued prior to the first suit, for he is not permitted to split up an entire demand, and bring several suits thereon; but he may show a breach subsequent to the former suit, and recover the actual damages arising from such subsequent breach."

(*c*) Cooke *v.* Whorwood, 2 Saund. 337; In Ashford *v.* Hand, Andrews, 370, an action on the case was brought by an indorsee, upon a note of hand, for paying 5*l.* 5*s.* by instalments; and the last day of payment being not y eco me, he counted only for such part as was due. "It was resolved, that though in the case of an entire contract an action cannot be brought until all the days are past, yet where the action sounds in damages, (which is the present case) the plaintiff may sue, in order to recover damages for every default made in payment."

(*d*) Bendernagle *v.* Cocks, 19 Wend. 207; Colvin *v.* Corwin, 15 Wend. 557; Pinney *v.* Barnes, 17 Conn. 420. In case of a running account, for goods sold or money lent, it has been held, that a suit upon one or more items, would bar a subsequent suit on other items due at the time of the first suit. Guernsey *v.* Carver, 8 Wend. 492; Bendernagle *v.* Cocks, *supra;* Lane *v.* Cook, 3 Day, 255; Avery *v.* Fitch, 4 Conn. 362. The opposite doctrine was held in Badger *v.* Titcomb, 15 Pick. 409. If any of the items were not due at the time of the action, a suit for them would not be thereby barred. McLaughlin *v.* Hill, 6 Verm. 20.

SECTION VII.

OF THE LEGAL LIMIT TO DAMAGES.

The law would avoid unnecessary litigation, would make it, where necessary, efficacious and conclusive in its action, and would protect each party against the other, by doing exact justice to both. These are its ends; and as its rules are only means for these, they are of secondary value; but as without them there would be no certainty in judicial action, and no accurate knowledge of personal rights and obligations, these rules are adhered to, although in one case or in another they work a hardship, until it is found that their general effect is mischievous, in which case they are set aside; or controlled by those more general rules by which the particular rules may be qualified and varied in their operation, and yet leave judicial action systematic and regular. These general remarks have an especial bearing on the subject of damages. Of the ancient rules some have been abrogated, and others greatly qualified. And in modern times, courts seek to apply to each case such rules as will carry out the universal rule, as far as may be, that the actual damages must measure the compensation given for it by the law.

1. *In an Action against an Attorney or Agent.*

Thus, in an action against an attorney for negligence, it was once said that the jury might find what damages they pleased. (*e*) But the law would not now relinquish its functions in this way; for although quite as strongly disposed as ever, that an agent should compensate his principal, or a servant his employer, for any wrong done, it would endeavor to measure the injury, and by the injury to measure the compensation, as carefully in this case as in any other. In accordance with this principle, it has been decided that where an agent is directed to sell goods, if he

(*e*) Russel *v.* Palmer, 2 Wils. 328.

can get a certain price, and not to sell for less, but does in fact sell for less, but without fraudulent purpose, the actual value of the goods sold, and not the price set upon them, must be considered in estimating the damages. (*f*) If a factor, having made advances on goods consigned to him for sale at a limited price, do afterwards, in good faith, and with reasonable delay and proper precautions, sell them for less than their limited price, but at a fair market price, he may recover the balance of his advances, if the consigner or principal refuse to pay them, on a proper application and after a sufficient

(*f*) Blot *v.* Boiceau, 3 Comst. 78, overruling S. C. 1 Sandf. 111; Anstill *v.* Crawford, 7 Ala. 335; Ainsworth *v.* Partillo, 13 Ala. 460.

In Frothingham *v.* Everton, 12 N. H. 239, the plaintiffs, March 27th, 1837, received of the defendant a consignment of wool, with instructions not to sell it for less than twenty-four cents a pound. The price of wool fell soon after the consignment, and continued to decline until October 5th, 1837, when the plaintiffs, without previous notice to the defendants, sold the wool for fourteen cents per pound, which was then the fair market price and as high as wool sold at any subsequent time before the suit was brought. An advance was made by the plaintiffs, at the time of the consignment, and this action was brought to recover the difference between the amount of that and the proceeds of the wool. It was held that the plaintiff could recover. *Parker*, C. J., said: "The next question is, to what extent the plaintiffs are accountable to the defendant for this breach of his instructions. If to the amount of the price limited, which would be the result of treating them as purchasers at the price limited, it goes to the whole of the plaintiffs' action. But upon what principle are they to be made accountable to that extent? The general principle is, that where one suffers by the negligence or breach of duty of another, the latter is answerable in damages for the amount of the injury. Had these goods been destroyed by the negligence of the plaintiffs, they would have been answerable for the value, and the damages could not have been extended beyond that, merely because the defendant had ordered them to sell at a certain price, and not for less. If, instead of a loss by negligence, the loss be by a disobedience of orders, without fraud, the result must be the same. Had the defendant brought his action against the plaintiffs, for wrongfully selling below the limit, he would have been entitled to recover the damages sustained by the wrongful act. If the goods of the principal are negligently lost or tortiously disposed of, by the agent, he is made liable for the actual value of the goods, at the time of the loss or conversion. Story on Agency, 215. And if, instead of bringing his action to recover this actual value, the consignor set up the breach of duty, in defence of a suit by the factor for moneys advanced upon the goods, the measure of his right must be the same. It cannot be extended beyond the amount of the injury sustained by him. And there can be no sound principle which will enlarge his rights in this respect, merely because he has obtained a general advance on the goods, unless there were an agreement that the factor should look to the goods alone for his reimbursement." In Blot *v.* Boiceau, *supra*, *Bronson*, J., said: "It is said that this rule of damages will enable factors to violate the instructions of their principals with impunity. But that is a mistake. If they sell below the instruction price, though at the then market value, they will take the peril of a rise in the value of the goods at any time before an action is brought for the wrong; and perhaps down to the trial. The owner has a right to keep his goods for a better price; and if the market value advances after the wrongful sale, the increased price will form the standard for ascertaining his loss, which the factor, who has departed from instructions, must make good."

time. (*g*) Still, it may be true that if the sale were fraudulent on the part of the agent, then it might be said that the agent had, as it were, taken for his own use the goods of his principal, and must pay for them the price which he knows that the principal had set on them.

If the failure of the agent to purchase goods ordered by his principal to be sent on a mercantile adventure, be the ground of the action, it is a question whether the price of the goods when they should have been purchased, or the price at which they would have been sold, should be taken in making up damages. We have already seen that the law generally disregards profits, from their remoteness and uncertainty. (*h*) But in this case, we think it should be held that the loss of the principal was not of the goods alone, but of the adventure; and that he should have, by way of compensation, such profits of the adventure as he can prove with reasonable certainty; that is, the plaintiff should be actually indemnified. (*i*) And on the other hand, as the converse of this rule, the defendant may show what the actual loss is, and reduce the claim of the plaintiff accordingly. (*j*)

(*g*) Parker *v.* Brancker, 22 Pick. 40; Marfield *v.* Goodhue, 3 Comst. 62. See also Frothingham *v.* Everton, *supra*.

(*h*) See pp. 459, 460, and notes.

(*i*) Ryder *v.* Thayer, 3 Louis. Ann. R. 149. In Bell *v.* Cunningham, 3 Peters, 69, S. C. 5 Mason, 161, the owners of The Halcyon at Boston, sent her from Havana to merchants at Leghorn, with directions to invest a part of her freight in marble tiles and the balance in wrapping paper, to be sent to Havana. The consignees, in violation of these directions, invested the entire freight in wrapping paper, on the sales of which a heavy loss was sustained. The marble tiles would have yielded a considerable profit. The action was brought against the consignees for breach of orders. The court held that the actual value of the tiles at Havana was to be considered in estimating the damages, thus allowing the probable profits of the adventure. *Marshall*, C. J., said: "We do not mean that speculative damages, dependent on possible successive schemes, ought ever to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profit to be derived from investments at the Havana, of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at the Havana, affords a reasonable standard for the estimate of damages." See Masterton *v.* The Mayor, &c. of Brooklyn, 7 Hill, 61.

(*j*) Allen *v.* Suydam, 20 Wend. 321; Hoard *v.* Garner, 3 Sandf. 179; Brown *v.* Arrott, 6 W. & S. 402, S. C. 6 Whart. 9; Van Wart *v.* Woolley, Dowl. & Ryl. 574. See also Harvey *v.* Turner, 4 Rawle, 223. In Allen *v.* Suydam the agent was negligent in not presenting a bill for acceptance at the proper time. It was held that the measure of damages was *primâ facie* the amount of the bill; but that the defendant was at liberty to show circumstances tending to mitigate damages or to reduce the recovery to a nominal amount.

If an agent sues his principal, or a servant his employer, the same rule will be applied. He can recover compensation for the injury sustained by the fault of the defendant, and no more. (*k*) If he claims re-payment of extra expenses, it is a good defence that they were caused by his own negligence. (*l*)

If he claims commissions it is a good defence that he has caused to his principal a greater loss than his claim, because this loss, for which he is liable, has more than repaid his claim. (*m*)

2. *In an Action against a Common-Carrier.*

If an action be brought against a common-carrier for not carrying or not delivering goods, all the elements which enter into the actual loss must be taken into consideration as in other cases. The general rules adopted seem to be these. If a carrier loses goods or make a wrong delivery, in such a manner as to render himself liable for them, the net value of the goods at the place of delivery is the measure of damages. (*n*) But if he fails to perform his contract, the goods being still within the power of the owner, the difference between their value at the place where he receives them and their net value at the place of delivery, at the time when they would have arrived, if they had been carried according to the contract, is the measure of damages, (*o*) and it seems that a jury may give interest by way of damages; when a loss arises from the misconduct of the carrier. (*p*)

(*k*) Stocking *v.* Sage, 1 Day's R. 522; Powell *v.* Newburgh, 19 Johns. 284; Adamson *v.* Jarvis, 4 Bing. 66.

(*l*) Montrion *v.* Jeffries, 2 Car. & Payne, 113; Howard *v.* Tucker, 1 B. & Ad. 712; Edmiston *v.* Wright, 1 Camp. 88.

(*m*) Dodge *v.* Tileston, 12 Pick. 328; White *v.* Chapman, 1 Starkie, 113; Kelly *v.* Smith, 1 Blatchf. C. C. 290. See also Bell *v.* Palmer, 6 Cow. 128; The Allaire Works *v.* Gnion, 10 Barb. 55. But damages cannot be recouped, unless they arise in the particular contract on which the action is founded; Deming *v.* Kemp, 4 Sandf. 147.

(*n*) Watkinson *v.* Laughton, 8 Johns. 213; Amory *v.* McGregor, 15 Johns. 24, 38; Brandt *v.* Borolby, 2 B. & Ad. 932; Arthur *v.* The Schooner Cassius, 2 Story, 81. In Wheelwright *v.* Beers, 2 Hall, 391, it was held, by a majority of the court, that in such cases the invoice price is to be the measure of damages, unless the carrier be guilty of fraud or fault; but *Oakley*, J., gave a very able dissenting opinion in favor of the rule as laid down above.

(*o*) Bracket *v.* M'Nair, 14 Johns. 170; O'Conner *v.* Forster, 10 Watts, 418. But see Smith *v.* Richardson, 3 Caines, 219.

(*p*) Watkinson *v.* Laughton, 8 Johns. 213. In Black *v.* Baxendale, 1 Exch.

But from the elements which make up the actual loss, are to be eliminated those causes of loss which spring not merely from the plaintiff's conduct, but also from his omission to do what he might by reasonable endeavors have done, to lessen the loss. For if when a carrier breaks his contract to carry goods, the owner can, by the exercise of ordinary diligence, obtain other means of conveyance, he is bound to obtain and use them, and cannot recover more than the loss occasioned by the extra expense, trouble, and delay. (*q*) So if a party contracts to furnish a certain quantity of cargo, and fails to deliver the entire quantity, the carrier is bound to receive goods from third persons, if offered, sufficient to make up the deficiency, even at a reduced rate of compensation, if offered at the current prices; and place the net earnings of the goods thus substituted to the credit of the person who originally agreed to furnish the whole cargo. (*r*) And if the owner of goods has received injury by the negligence of the carrier, the acceptance of the goods is no bar to the action, but may be considered in mitigation of damages. (*s*)

In this action, as well as in some others, the question has arisen whether the value of the goods to be taken as a measure, is that value which could be realized in open market, without reference to the true worth of the thing. If some wild speculation, or the prevalence of a gross error has given to certain articles for a brief time, a value altogether in excess of its natural value, and the fault of the defendant has prevented the plaintiff from obtaining this price by selling at the highest point of the market, can the defendant show in mitigation of damages, the utter unreasonableness of such a price and its brief duration? The answer both of reason and of authority seems to be, that while the plaintiff cannot avail himself of any acts on his part of fraudulent character, he is entitled to compensation

410, it was held that the necessary expenses to which the owner is put, in consequence of the carrier's delay to fulfil his contract, are recoverable as damages.

(*q*) O'Conner *v.* Forster, 10 Watts, 418.

(*r*) Heeksher *v.* McCrea, 24 Wend. 304; See also Shannon *v.* Comstock, 21 Wend. 457; Costigan *v.* M. & H. R. R. Co. 2 Denio, 610; Walworth *v.* Pool, 4 Eng. (Ark.) 394; Robinson *v.* Noble, 8 Peters, 181.

(*s*) Bowman *v.* Teall, 23 Wend. 306.

for his actual loss of any price he might have honestly obtained. (*t*)

3. *In the Action of Trover.*

In the action of trover, to which a plaintiff generally resorts for remedy when his personal property has been appropriated by another, the value of the property is, in general, the measure of the damages. (*u*) It is true that this is sometimes no adequate compensation for the injury he has sustained; but then he should have sued in trespass, in which action he might have recovered also compensation for the additional damage he has sustained, if it were the direct and natural consequence of the injury. He must be limited by the action he brings; for if he waives the tort altogether, and brings assumpsit for money had and received, he can recover

(*t*) Smith *v.* Griffith, 3 Hill, 333. This was an action against common-carriers, for injury to a quantity of mulberry trees, in consequence of delaying to transport them. After the plaintiff had given evidence of their market value at the time the injury occurred, the defendant offered to prove that at that time the market value was factitious; that from subsequent experiments this kind of trees had been ascertained to be of no intrinsic value; that they were not worth cultivating for the purpose of raising silk-worms; and that, if as much had been known of them, when the injury occurred, as at the time of the trial, they could have been bought at a very low price. This evidence was held inadmissible, *Cowen*, J., dissenting. *Nelson*, C. J., said: "Assuming that there is no defect in the qualtity of the article, the fair test of its value, and consequently of the loss to the owner, if it has been destroyed, is the price at the time in the market. This makes him whole, because the fund recovered enables him to go into the market and supply himself again with the goods of which he has been deprived. The objection to the evidence offered, is that it proposed to take into consideration the fluctuations of the market value long subsequent to the time when the injury happened; thereby making the measure of damages depend upon the accidental fall of prices at some future period, which might or might not occur; and if it did, the loss might or might not have fallen upon the plaintiff, as for aught the court or jury could know, he may have parted with the property before depreciation. . . . I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, to control the market for their own private ends, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation or depression of prices should control the question. These are often accidental, produced by interested and illegitimate combinations, for temporary, special, and selfish objects, independent of the influences of lawful commerce, — a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice."

(*u*) Mercer *v.* Jones, 3 Camp. 477; Kennedy *v.* Strong, 14 Johns. 128; Kennedy *v.* Whitwell, 4 Pick. 466; Sargent *v.* Franklin Ins. Co. 8 Pick. 90; Parks *v.* Boston, 15 Pick. 198, 207, per *Shaw*, C. J.

only the amount which the defendant has actually received by the sale of the property, although this may be much less than its value. (*v*) If an owner bring trover after he has regained the possession of his property, or otherwise had the equivalent benefit of it, he can only recover damages to the extent of the injury he has sustained; as, for example, for the injury to the chattel, and the value of its use. (*w*) If the defendant has a lien on the property for a certain amount, that amount may be deducted by the jury from the value, in assessing the damages. (*x*)

In trover for a bill, or note, or other chose in action, the measure of damages is, *primâ facie*, the value on its face. (*y*) But the insolvency of the parties liable therein, payment, in whole or in part, or any other facts tending directly to reduce its value, may be shown in mitigation of damages. (*z*)

Whether, in this or any action, instead of the actual value, that which the plaintiff puts upon the property, as a gift, perhaps, of a dear friend, or for other purely personal reasons, can be recovered, is not perhaps certain. We think it quite clear, however, that this *pretium affectionis* cannot be recovered unless in cases where the conversion or appropriation by the defendant was actually tortious; and in that case we should be disposed to hold, that the defendant should be made to pay what he would have been obliged to give if he had bought the article; or, at least, that the damages might be considerably enlarged in such a case, on the principle of exemplary damages. (*a*)

(*v*) 3 Amr. Jur. 288, 289; Bac. Abr. Trover, A.; Lindon *v.* Hooper, Cowp. 419, per Lord *Mansfield;* Hunter *v.* Prinsess, 10 East, 378, 391, per Lord *Ellenborough.*

(*w*) Greenfield Bank *v.* Leavitt, 17 Pick. 1; Curtis *v.* Ward, 20 Com. 204; Erving *v.* Blount, 20 Ala. 694; Sparks *v.* Purdy, 11 Miss. 219; Hunt *v.* Haskell, 24 Maine, 339.

(*x*) Green *v.* Farmer, 4 Burr. 2214, 2223; Chamberlin *v.* Shaw, 18 Pick. 283; Fowler *v.* Gilman, 13 Mete. 267.

(*y*) Mercer *v.* Jones, 3 Camp. 477.

(*z*) Ingalls *v.* Lord, 1 Cow. 240; Romig *v.* Romig, 2 Rawle, 241.

(*a*) Lord Kaimes's Principles of Equity, bk. 1, part 1, ch. iv, § v, p. 159; Sedgwick on Damages, p. 474; Suydam *v.* Jenkins, 3 Sandf. 621. Per *Duer*, J.: "In most cases, the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, &c., and we do not doubt that the '*pretium affectionis*,' instead of the market price, ought then to be considered by the jury or court, in estimating the value." In Mississippi, in the case of a slave, the owner is permitted to seek equitable relief, and to claim a specific return of the property, where at

The value of the property being the measure of damages in trover, as this value may be different at different times and in different places, the question occurs which of these values is to be this measure. If goods are taken from the owner, and some months afterwards an action is brought, the owner may have lost the opportunity of selling them at the highest price they have reached in the interval. Is he limited to their value when converted; or if they have a higher value when he brings his action or tries it, may he have that value; or if they have been higher, and are now lower, may he have the highest price that he could at any time have received for the property, had it remained in his possession? Similar questions arise sometimes in actions for breach of contract to sell for a price payable in specific articles, in replevin, and in some other cases. The answer to these questions, to be deduced from the general current of authority, is, that the value of the property at the time of the conversion, with interest thereon, measures the damages. (*b*)

common law he would have been limited to an action for damages. Butler *v.* Hicks, 11 Sm. & Marsh. 78; Hull *v.* Clark, 14 Sm. & Marsh. 187.

(*b*) Kennedy *v.* Strong, 14 Johns. 128; Hepburn *v.* Sewell, 5 H. & J. 211; Kennedy *v.* Whitwell, 4 Pick. 466; Pierce *v.* Benjamin, 14 Pick. 356, 361; Parks *v.* Boston, 15 Pick. 198; Johnson *v.* Sumner, 1 Metc. 172; Clark *v.* Whitaker, 19 Conn. 319; Smethurst *v.* Woolston, 5 Watts & Serg. 106; Watt *v.* Porter, 2 Mason, 76; Lillard *v.* Whitaker, 3 Bibb, 92; Sproule *v.* Ford, 3 Litt. 25. In the case of Suydam *v.* Jenkins, 3 Sandf. 614, this subject was discussed with great ability, in a very elaborate opinion, delivered by *Duer*, J. The cases of West *v.* Wentworth, 3 Cowen, 82, and of Clark *v.* Pinney, 7 Cowen, 681, in which it was held that the measure of damages in cases where property has been withheld, is the highest market price between the time of the wrongful withholding and the time of the trial, were questioned, and the general measure of damages was held to be the value of the property at the time the right of action accrued, with interest thereon. But if it can be shown that the addition of interest fails to compensate the owner for his actual loss, or to prevent the wrongdoer from realizing a profit, it was held that a further compensation should be made. *Duer*, J., said: "It may be shown that had the owner retained possession, he would have derived a larger profit from the use of the property than the interest upon its value; or that he had contracted to sell it to a solvent purchaser at an advance upon the market price; or that when wrongfully taken or converted, it was in the course of transportation to a profitable market, where it would certainly have arrived; and in each of these cases the difference between the market value when the right of action accrued, and the advance which the owner, had he retained the possession, would have realized, ought plainly to be allowed as compensatory damages, and as such to be included in the amount for which judgment is rendered. So where it appears that the owner in all probability would have retained the possession of the property until the time of trial or judgment, and that it is then of greater value than when he was dispossessed, the difference may fairly be considered as a part of the actual loss resulting to him from the change of possession, and should therefore be added to the original value

But it is certain that the courts are by no means in agreement on this point; and some exceptions to the rule should certainly be admitted. Thus, if it can be shown that the plaintiff suffered by the wrongdoing of the defendant, a specific injury, as by the failure of a specific purpose for which he had bought the goods, or perhaps by the loss of a specific opportunity of selling them, at a certain profit, the principle of compensation would require that this should be taken into consideration. (*c*) And if a wilful and actual tort enter into the plaintiff's case, it has been held that the defendant should be compelled to pay to the plaintiff all that the plaintiff may have lost in any way by his wrongdoing. (*d*)

to complete his indemnity. . . Even where the market value of the property, when the right of action accrued, would more than suffice to indemnify, it is not, in all cases, that the liability of the wrongdoer should be limited to that amount. It is for the value that he has himself realized, or might realize, that he is bound to account, and for which, judgment should be rendered against him. Hence, should it appear in the evidence upon the trial, that he had in fact obtained on the sale of the property a larger price than its value when he acquired possession, or that he still retained the possession, and that an advanced price could then be obtained, in each case the increase upon the original value, (which would otherwise remain as a profit in his hands) ought to be allowed as cumulative damages. . . It seems to us exceedingly clear, that the highest price for which the property could have been sold at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. When the evidence justifies the conclusion that a higher price would have been obtained by the owner, had he kept the possession, or has been obtained by the wrongdoer, we have admitted and shown that it ought to be included in the estimation of damages; in the first case, as a portion of the indemnity to which the owner is entitled, and in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is shown that it would not have been obtained by the owner, and has not been obtained by the wrongdoer." The highest market value between the time of the conversion and that of the trial, was held to be the measure of damages in the following cases: Greening *v.* Wilkinson, 1 C. & P. 625; West *v.* Wentworth, 3 Cowen, 82; Clark *v.* Pinney, 7 Cowen, 681; Schley *v.* Lyon, 6 Geo. 530; Erving *v.* Blount, 20 Ala. 694; Kid *v.* Mitchell, 1 Nott & McCord, 334. In debt on bonds for the replacement of stock, the higher value of the stock at the time of the trial has been held the just measure of damages. Shepherd *v.* Johnson, 2 East, 211; McArthur *v.* Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412. These cases are examined in Suydam *v.* Jenkins, 3 Sandf. 614, 632. But see Kortright *v.* Buffalo Com. Bank, 20 Wend. 91; S. C. 22 Id. 348. In Massachusetts, the rule which makes the value at the time the right of action accrues, with interest thereon, the measure of damages for withholding property, seems to be established in all cases. Gray *v.* Portland Bank, 3 Mass. 364; Sargent *v.* Franklin Ins. Co. 8 Pick. 90, and cases cited *supra*.

(*c*.) Dunlop *v.* Higgins, 1 Clarke & Fin. 381, 402; S. C. 12 Jurist, 295, per *Lord Cottenham*, Ld. Ch. See *supra*, note (*b*).

(*d*) Dennis *v.* Barber, 6 S. & R. 420; Harger *v.* M'Mains, 4 Watts, 418. But see *supra*, note (*m*).

A question may arise in the case of accession or confusion of goods. The law on this subject, as stated generally, by Blackstone, (*e*) is, no doubt, in force at this day, and in this country, so far as it relates to the title to property, which is all that he is speaking of. He uses the word "willfully," in speaking of confusion. But it may be doubted, even on the authority of the civil law, to which Blackstone refers, whether, in a case of fraudulent confusion, the party in fault does not lose his goods; and on the other hand, it may be doubted whether, if the confusion be voluntary, but perfectly honest, the other party takes the whole property, without any allowance for the value added to his own. We cannot but think that the intent of the parties, and the moral character of the transaction, would enter into the law of the case. (*f*)

(*e*) Says Blackstone: "The doctrine of property arising from *accession* is grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled, by his right of possession, to the property of it, under such its state of improvement; but if the thing itself, by such operation, was changed into a different species—as, by making wine, oil, or bread out of another's grapes, olives, or wheat—it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts. It hath even been held if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman. But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that, in both laws, the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil-law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent." 2 Black. Com. 404, 405.

(*f*) Willard *v.* Rice, 11 Mete. 493; Pratt *v.* Bryant, 20 Vt. 333; Wingate *v.* Smith, 20 Maine, 287. In Ryder *v.* Hathaway, 21 Pick. 298, trespass was brought for carrying away and converting twenty-three cords of wood. The defendant justified on the ground that the plaintiff had so mixed his own wood with the defendant's that it was impossible to distinguish them. *Morton*, J., after citing from 2 Kent's Comm. 297; "If A. wilfully intermix his corn or hay, with that of B., so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B," said; "but this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or

So, also, in a case of accession, to take the very instances given by Blackstone, if one innocently took a piece of cloth, or an ingot of gold, believing it to be his own, and quadrupled the value of the article by his skill and labor expended upon it, and refused to deliver it to the true owner, in the honest belief of his title, and without moral fault, — if the owner succeeded, in trover, in proving the property to be his, we are of opinion that the defendant would be allowed something by way of mitigation of damages, of recoupment, or in some other way, so that while the plaintiff was fully compensated, he should not be permitted to gain greatly, and the defendant made to suffer greatly, by his mere mistake. Indeed, the rule, as given in Blackstone, and sustained to some extent by the authorities in the Year Books, would lead to this strange conclusion: that if one takes another's property, and expends upon it ten times its value in his labor, but without going so far as to change it into a different species, he loses all his labor, and the original owner gains it. But if he goes so much farther as to make this change, then he saves all the value of his labor, and the original owner can recover only the primitive value of the property taken. (*g*)

that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental mixtures, it would be unreasonable and unjust, that he should lose his own, or be obliged to take his neighbor's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture were such as to destroy the property, the whole loss should fall on him whose carelessness, or folly, or misfortune caused the destruction of the whole." See Colwill *v.* Reeves, 2 Camp. 575.

(*g*) In cases where a party has, under a contract with the owner, increased the value of goods by his labor and then converted them to his own use, the value of the goods before the labor has been expended, has been given in damages. Dresser Manuf. Co. *v.* Waterston, 3 Metc. 9. See Green *v.* Farmer, 4 Burr. 2214. But where goods have been wrongfully taken and their value increased by accession, the rule laid down in the Year Book, 5 H. 7, fol. 15, is that the owner can follow his property as long as the identity of the original material can be proved; but if the nature of the thing be changed, as grain into malt, or silver into money, so that the original material cannot be identified, the original owner loses his property, and can only claim damages for the article as originally taken. The first part of the rule that the owner can follow his property as long as the identity of the original material can be shown, and take it without remunerating the wrongdoer for his trouble, has often been sanctioned. Betts *v.* Lee, 5 Johns. 349; Curtis *v.* Groat, 6 Id. 168; Brown *v.* Sax, 7 Cowen, 95; Suyder *v.* Vaux, 2 Rawle, 427; Martin *v.* Porter, 5 M. & W. 352; Wood *v.* Morewood, 3 Q. B. 444, *in notis*. As regards the first part of the rule, no distinction has been taken in any of the adjudications between a case where the wrongful taking was fraudulent and where it was by mistake. But as regards

There are strong reasons, and authorities of much weight, in favor of the doctrine that special damages may be recovered in this action, that is, damages in addition to the value of the goods, for losses or expenses directly and naturally resulting from the conversion; but it would seem that these special damages should be specially alleged in the declaration. (*h*)

If the plaintiff claims the property converted merely by a lien to secure a debt, he recovers only the amount of the debt, because that is the measure of his interest, if the defendant have any title or interest at all. (*i*) But if the defendant be

the second part of the rule, in the late case of Silsbuy *v.* McCoon, 3 Comst. 379, a majority of the Court of Appeals overruled two previous decisions of the Supreme Court, in the same case, reported in 6 Hill, 425, and 4 Denio, 332, and decided, after a very able argument of the case, that a *willful* wrongdoer can acquire no property in the goods of another, by any change whatsoever wrought in them by his labor or skill, provided it can be shown that the improved article was made from the original material; and consequently it was held, that the title to corn was not changed by its conversion into whiskey. The second part of the rule in the Year Books was said to have no application in the case of a *willful* wrongdoer. But where the improved property was not changed in its nature, so that it could be reclaimed by the original owner in all cases, no distinction was taken between the rights of a wrongdoer who has acted with a fraudulent purpose, and one who has acted by mistake. *Ruggles*, J., in delivering the opinion of a majority of the court, said; "So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership." But this rigid rule has been questioned and the opinion expressed in the text approved by several authorities. Brown *v.* Sax, 7 Cowen, 95, per *Sutherland*, J., Silsbuy *v.* McCoon, 4 Denio, 332, 337, per *Bronson*, J. See Benjamin *v.* Benjamin, 1 Conn. 347, 358.

(*h*) In Suydam *v.* Jenkins, 3 Sandf. 614, 627, *Duer*, J., said: "In England the law may be considered as settled, that additional damages, if laid in the declaration, and directly resulting from the wrongful act of the defendant, are recoverable. (Davis *v.* Oswell, 7 Car. & P. 804; Bodley *v.* Reynolds, 8 Q. B. 779; Rogers *v.* Spence, 15 Law Journal, N. S. 52). And an early decision to the same effect, is found in our own reports. (Shotwell *v.* Wendover, 1 Johns. 65.) It is true, that in Brizee *v.* Maybee, (21 Wend. 144,) Mr. J. *Cowen*, speaking as the organ of the court, seems to have held that under no circumstances ought the jury to be permitted to find special damages in the action of trover; and the Supreme Court of Pennsylvania seems to have given its sanction to the same doctrine, (Farmers' Bank *v.* Mackie, 2 Penn. St. R. 318;) but as this doctrine, literally understood, in effect denies the right of the plaintiff to a full indemnity, however certain the evidence of his loss, the language of the learned judges ought perhaps to be construed as only meaning special damages ought never to be allowed, where, from the nature of the case, the estimate must be uncertain and conjectural; and the doctrine thus explained and limited, we are far from wishing to controvert."

(*i*) Hays *v.* Riddle, 1 Sandf. 248; Spoor *v.* Bokkelin, 7 Cowen, 670; Spoor *v.* Holland, 8 Wend. 445; Lloyd *v.* Good-

a mere stranger, the plaintiff has a title to the whole, as against him, and recovers the whole value. (*j*) Where a pledgee tortiously withholds the pledge, or has sold it, without calling on the pledgor to redeem, and the pledgor bring an action against him, the pledgee may have the amount of his debt deducted or recouped in the assessment of damages. (*k*)

4. *In the Action of Replevin.*

By the action of replevin, the plaintiff, having taken property which he calls his own, seeks to establish his title; and the defendant, denying the plaintiff's title, endeavors to establish his own. But, incidental to these questions of title, are those of damages. The plaintiff claims compensation for the wrong done to him, in taking his goods and compelling him to resort to this process to recover them. The defendant claims to have his goods back again, and also damages for taking them, by this process. (*l*) We should apply here the same principles which have been already stated in relation to trover; each party may claim complete compensation, and no more. The plaintiff has the goods, and if he succeeds should have so much more as he has lost, or the defendant has gained, or might well have gained, by the taking and detention of them. If the defendant succeed, he should have, beside his payment for a return, damages to

win, 12 S. & M. 223; Strong *v.* Strong, 6 Ala. 345; Cameron *v.* Wynch, 2 C. & R. 264. In Hickok *v.* Buck, 22 Vt. 149, the defendant leased to the plaintiff a farm for one year, and by the contract was to provide a horse for the plaintiff to use upon the farm for that term. He furnished the horse, but took him away and sold him before the expiration of the term, without providing another. It was held that the plaintiff acquired a special property in the horse and was entitled to recover in an action of trover damages for the loss of the use of the horse during the residue of the term.

(*j*) White *v.* Webb, 15 Conn. 302; Lyle *v.* Barker, 5 Binney, 457; Schley *v.* Lyon, 6 Geo. 530. In Heydon and Smith's case, 13 Coke's R. 67, it is laid down; "So is the better opinion in 11 H. 4, 23, that he who hath a special property in goods, shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over." These remarks apply as well to trover as to trespass.

(*k*) Jarvis *v.* Rodgers, 15 Mass. 389; Stearns *v.* Marsh, 4 Denio, 227.

(*l*) Bruce *v.* Learned, 4 Mass. 614, 617, per *Parsons*, Ch. J. If the jury find the property to be part in the plaintiff, and part not, each party is entitled to damages and costs. Powell *v.* Hinsdale, 5 Mass. 343.

cover his direct loss by the taking and detention. (*m*) Whichever party establishes his property in the goods, has also a right to have made good to him by damages, any deterioration which they may have suffered while wrongfully in the hands of the other party. (*n*) This rule, however, is subject to the qualification, that a plaintiff in replevin who retains the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value, during that period; because he might sell them immediately in such a manner as to ascertain their value, for which alone he is answerable on his bond. (*o*)

It has been held that an action on the replevin bond is defeated by the destruction of the property in the hands of the plaintiff in replevin, by the act of God, before the judgment. (*p*) But this decision has been much doubted, on the ground that if one takes property from its true owner, if it be destroyed in the hands of the taker, it should be regarded as his loss, and not as the loss of the owner. (*q*) Such would doubtless be the decision if the same defence were attempted against an action of trespass or trover.

The question as to the time when the value of the goods should be taken, to which we have alluded in speaking of trover, may also arise in an action on the replevin bond, or if the defendant prevails in the original suit; and we think it must be governed by the principles we have already stated as applicable to that action. (*r*)

In an action upon a replevin bond, the value of the property, as indorsed upon it, is, at the plaintiff's election, taken as its true value. (*s*)

(*m*) Rowley *v.* Gibbs, 14 Johns. 385; See *supra*, note (*b*).

(*n*) Rowley *v.* Gibbs, 14 Johns. 385.

(*o*) Gordon *v.* Jenney, 16 Mass. 465.

(*p*) Carpenter *v.* Stevens, 12 Wend. 589.

(*q*) Suydam *v.* Jenkins, 3 Sandf. 614, 643, per *Duer*, J.

(*r*) *Supra*, note (*b*.) The value of the goods at the time of the service of the writ of replevin, with interest until the rendition of judgment, is held to be the ordinary measure of damages when the defendant prevails. Brizsee *v.* Maybee, 21 Wend. 144; Mattoon *v.* Pearce, 12 Mass. 406; Barnes *v.* Bartlett, 15 Pick. 71; M'Cabe *v.* Morehead, 1 W. & S. 516; Caldwell *v.* West, 1 N. J. 411, 422.

(*s*) Middleton *v.* Bryan, 3 M. & S. 155; Huggeford *v.* Ford, 11 Pick. 223; Parker *v.* Simonds, 8 Metc. 205. In an action of debt on a replevin bond, the original plaintiffs having failed in their action, and a writ of restitution having been issued, by virtue of which the defendant demanded the goods, he was held entitled to the value of the goods at the time of the demand. Swift *v.* Barnes, 16 Pick. 194. See also Howe *v.* Handley, 28 Maine, 241, and Suydam *v.* Jenkins, 3 Sandf. 614, 645, per *Duer*, J.

If the writ, in replevin, is sued out maliciously, it has been held that exemplary damages may be given in this case, as for a wanton and malicious trespass. (*t*) But in an action on a replevin bond, it is said that counsel fees, or compensation for attendance at court in the replevin suit, cannot be recovered. (*u*)

If one of the parties has but a qualified right in the property, as by attachment or lien to secure a debt, he recovers only to the extent of that lien or interest, unless the other party fails to make out any rightful title or interest whatever. (*v*) Nor can the defendant recover the value of the whole property, if, after the action commenced, he repossessed himself of a part of it. Although the plaintiff is nonsuited in an action of replevin, he may still offer testimony to prove ownership of the property in himself, upon inquiry into the right of the defendant's possession, for the purpose of showing that the defendant has sustained no substantial damage, as the plaintiff was the owner of the property. (*w*) This action being, as it is said, in substitution of the old action *de bonis asportatis*, must be governed, at least in this respect, by the rules of that action. (*x*)

5. *Where a Vendee sues a Vendor.*

If a vendee, to whom the vendor has not delivered the articles sold agreeably to his contract, brings an action for the breach, he may be said to have sustained no loss unless the articles have risen in value. He could not maintain his action without tendering the price, and if the articles would bring no more than this, he would gain nothing if they were delivered to him, and loses nothing if they are withheld.

(*t*) M'Donald *v.* Scaife, 11 Penn. St. 381. Brizsee *v.* Maybee, 21 Wend. 144; Cable *v.* Dakin, 2 Id. 172; M'Cabe *v.* Morehead, 1 W. & S. 516.

(*u*) Davis *v.* Crow, 7 Blackf. 129.

(*v*. Scrugham *v.* Carter, 12 Wend. 131; Lloyd *v.* Goodwin, 12 S. & M. 223. In Jennings *v.* Johnson, 17 Ohio, 154, it was held that if property be replevied from a sheriff holding it under execution, and the issue be found for the defendant, if the value of the property be greater than the amount of the execution, the rule of damages is the amount of the execution with interest thereon; but if the value of the property be less than the amount of the execution, then the measure of damages is the full value of the property.

(*w*) Herman *v.* Goodrich, 1 Greene, (Iowa,) 13. See also Wallace *v.* Clark, 7 Blackf. 298.

(*x*) De Witt *v.* Morris, 13 Wend. 496.

But although they may have gained nothing in value up to the time when they should have been delivered, they may have gained greatly since, and it is precisely for the loss of this gain that the vendee demands compensation. A distinction is made here, by some authorities, which does not appear to us to rest upon perfectly satisfactory and conclusive reasons. It is said that if the vendee bought on credit, the value of the goods at the time of the purchase, or at the time when delivery was due, should be taken as the measure of damages. But if he paid the price down, or in advance, then he is entitled not only to their increase in value at the time he brings his action, but to any increase which may have taken place at any intermediate period between the purchase and the action, even if the value had fallen again before the action. (*y*) But if compensation is to be the measure, it would be difficult to find a very good reason for this difference. It may indeed be said, that one who buys not only on credit, but without any definite period of payment, and who acquires a right to the goods only by tendering the price, and makes this tender only when he brings the action, necessarily fixes that time as the time of the purchase, of the delivery, and of the standard of value. (*z*) But if one buys to-day, the goods to be delivered to-day, and the price is to be paid in three months, and the goods are withheld without sufficient cause, there does not seem to be any clear and

(*y*) Shepherd *v.* Hampton, 3 Wheat. 200; *Marshal*, C. J.: "The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article at the time it was to be delivered, is the measure of damages. For myself only, I can say that I should not think the will would apply to a case where advances of money had been made by the purchaser under the contract." This distinction was adopted in Clark *v.* Pinney, 7 Cowen, 681, with the qualification that in order to recover the highest price between the period for delivery and the day of trial, the suit must be brought within a reasonable time. Davis *v.* Shields, 24 Ward, 322. In suits on bonds for the replacement of stock, the higher value thereof on the day of trial has been allowed as the measure of damages. Shepherd *v.* Johnson, 2 East, 211; McArthur *v.* Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 625; Donner *v.* Back, 1 Stark. 254. See Tempest *v.* Kilmer, 3 C. B. 249. But the authority of these cases in this country is very doubtful; Wells *v.* Abernethy, 5 Conn. 227, per *Hosmer*, C. J.; Gray *v.* The Portland Bank, 3 Mass. 390; Suydam *v.* Jenkins, 3 Sandf. 632–636. They have, however, been recently approved in Connecticut. West *v.* Pritchard, 19 Conn. 212. See Com. Bank of Buffalo, 22 Wend. 348; Wilson *v.* Little, 2 Comst. 443.

(*z*) Suydam *v.* Jenkins, 3 Sandf. 639.

convincing reason for giving him a compensation different from that to which he would be entitled as damages, if he paid the price down. (*a*) We have considered a similar question, — as to the time when the value of property is to be taken, — repeatedly, because different principles have been applied to it in different actions. But we doubt if this be wise or just. If we adhere to the simple rule of compensation, we should say, that in every action to recover damages for the wrongful detention of personal property, the plaintiff should recover full compensation for the loss of all that he might fairly have gained during the whole period of the defendant's misappropriation; and the defendant should be supposed to have made his wrongful act as profitable to himself as the market at any time permitted, — excepting, perhaps, accidental and momentary inflations — and should be compelled to give over this profit to the plaintiff. And it will be seen in our notes, that we have recent authority for this general rule. (*b*)

(*a*) This distinction has, in some cases, been overruled, and the value of the property at the time and place of the promised delivery taken as the measure of damages, without reference to the previous payment of the consideration. Smethurst *v.* Woolston, 5 W. & S. 106; Smith *v.* Dunlap, 12 Illinois, 184; Bush *v.* Canfield, 2 Conn. 485; Wells *v.* Abernethy, 5 Id. 222; Vance *v.* Journe, 13 Low. 225; Sargent *v.* The Franklin Ins. Co. 8 Pick. 90; Startup *v.* Cortuzzi, 1 C. M. & R. 165. Where the price has not been paid by the vendee, the authorities generally agree; some of them not noticing the distinction we have mentioned, that the difference between the market value of the goods at the time of the promised delivery, and the contract price, is the measure of damages. Leigh *v.* Patterson, 8 Taunt. 540; Gainsford *v.* Carroll, 2 B. & C. 624; Boorman *v.* Nash, 9 Id. 145; Shaw *v.* Holland, 15 M. & W. 136; Douglass *v.* McAllister, 3 Cranch, S. C. 298; S. C. 1 Cranch, C. C. 241; Gilpin *v.* Consequa, Peters, C. C. 85; Day *v.* Dox, 9 Wend. 129; Beals *v.* Terry, 2 Sandf. 127; Shaw *v.* Nudd, 8 Pick. 9; Swift *v.* Barnes, 16 Id. 194; Smith *v.* Berry, 18 Maine, 122; Marchhessean *v.* Chaffee, 4 La. Ann. R. 24. There are cases which hold that in trover the highest value of the goods at any intermediate period between the conversion and the trial is the measure of damages. West *v.* Wentworth, 3 Cowen, 82; Greening *v.* Wilkinson, 1 C. & P. 412. See Fisher *v.* Prince, 3 Burr. 1363; Whitten *v.* Fuller, 2 Bl. 902. In detinue, for railway scrip, the measure of damages was held to be the difference between its value when demanded and its depreciated value when delivered up. Williams *v.* Archer, 5 C. B. 318; S. C. 2 C. & K. 26; Tempest *v.* Kulmer, 3 C. B. 249. See Com. Bank of Buffalo, 22 Wend. 348; Wilson *v.* Little, 2 Comst. 443.

(*b*) Suydam *v.* Jenkins, 3 Sandf. 614. See *supra*, note (*b*.) Dunlap *v.* Higgins, 1 House of Lords Cas. 381, 403, 12 Jur. 295. Lord Chancellor *Cottenham:* "Suppose, for instance, a party who has agreed to purchase 2,000 tons of pig iron, on a particular day, has himself entered into a contract with somebody else, condition for the supply of 2,000 tons of pig iron, to be delivered on that day, and that he, not being able to obtain those 2,000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but the pursuers had lost 1,000*l.* upon a contract with a railway company, in my opinion they ought not only to recover the damage which

In determining what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; (*c*) and it would seem that neither party ought to gain or to lose by a mere fancy price, or an inflated and accidental value suddenly put in force by some speculative movement, and as suddenly passing away. (*d*) The question of measurement of damages by a market value is peculiarly one for the jury. But a court would not willingly permit them to take any extreme of valuation, whether high or low, which contradicted existing facts, and rested only on a merely speculative opinion of a future want or excess. The plaintiff should not be permitted to make a profit by the breach of his contract, which he could not have naturally expected to make by its performance; nor should he be subjected to a loss, and the defendant be permitted to make a saving, on a merely speculative possibility. The inquiry always should be, what was the value of the thing at that time, taking into consideration all proved facts of price and sale, and all rational and distinct probabilities, and nothing more. (*e*)

would have arisen if they had gone into the market and bought the pig iron at that increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform—that of deciding the amount of damage which the party had suffered by the breach of his contract." But in trover, for goods sold, it was held in Massachusetts that the rule of damages is their value at the time of the conversion, notwithstanding the vendor has resold them at an advanced price before the trial; Kennedy *v.* Whitwell, 4 Pick. 466; See Hanna *v.* Harter, 2 Pike, (Ark.) 397, where in an action against a vendor for refusing to complete a contract of sale, it was held that the sum at which he resold the article does not establish its market value.

(*c*) Joy *v.* Hopkins, 5 Denio, 84.

(*d*) Younger *v.* Givens, 6 Dana, 1.

(*e*) Blyndenburgh *v.* Welsh, 1 Baldwin, 331, 340. Per *Hopkinson*, J: "It is the price — the *market price* of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value* — the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which if true would augment its value, may suspend their sales and put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth on a future day, if the contingency shall happen which

If the vendee objects that the articles are not such as he bargained for, he may rescind the contract as a whole, but as we have seen, not as to a part. If, therefore, he has received a part of the goods, he cannot retain them and have damages on the non-delivery of the whole; nor can he require the delivery of the residue, after he has ascertained their quality, and then have his claim for damages. (*f*)

6. *Where a Vendor sues a Vendee.*

If a vendor sues the vendee, he demands, by way of damages, the price the vendee should have paid. Usually this is fixed by the parties; if not, it may be fixed by subsequent facts, as by a *bonâ fide* sale by the vendee. (*g*) If not, then a fair price must be given, as ascertained by testimony. If the goods remain in the vendor's hands, it may be said that now all his damage is the difference between their value and the price to be paid; which may be nothing. This would be true if the vendor chose to consider the articles as his own, or if the law obliged him to consider them as his

is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance." See Smith *v.* Griffith, 3 Hill, 333; Younger *v.* Givens, 6 Dana, 1. Evidence of value at places in the vicinity of the place of delivery may be admitted to show the value at that place. But where the evidence is clear and explicit as to the value at that place, such value must control, no matter what the value is at other places. Gregory *v.* McDowell, 8 Wend. 435.

(*f*) Shields *v.* Pettee, 2 Sandf. 262. The defendants purchased of the plaintiffs one hundred and fifty tons of pig iron, No. 1, to arrive in the ship Siddons. The iron which arrived was not of that quality, and for that reason the defendants, after receiving a part, refused to receive the remainder, or pay the contract price for the part already received. In the meantime the market price had risen, so that iron of the quality delivered was worth two or three dollars per ton more than the contract price. This action was brought for the value of the iron delivered. *Oakley*, C. J., said: "Assuming the contract to be obligatory, the defendants, on finding the iron they were receiving was not No 1, were at liberty to continue to receive it as a fulfilment of their purchase, or they could have repudiated the delivery and brought their action for damages. But they could not do both. They had no right to receive a part of the goods, retain such part, and refuse to receive the residue." Accordingly it was held that the defendants could not recoup damages for the non-fulfilment of the contract by the plaintiffs, but that they were bound to pay the market price of the iron delivered.

(*g*) In Greene *v.* Bateman, 2 Wood & M. 359, there was such a misunderstanding as to the price that no express contract could be proved. But the vendee having offered to return the goods, and the offer having been declined, sold them. It was held, in an action of assumpsit, that he must be treated as the trustee of the vendor, selling on his account and for his benefit, and liable to the vendor for the price received, deducting compensation for his services.

own. (*h*) But it does not seem that the law lays upon him any such obligation. He may consider them as his own, if there has been no delivery; or he may consider them as the vendee's, and sell them, with due precaution, to satisfy his lien on them for the price, and then he may sue and recover only for the unpaid balance of the price; or he may consider them as the property of the vendee, subject to his call or order, and then he recovers the whole of the price which the vendee should pay. (*i*) As the action, in either case, proceeds upon the breach of the contract by the vendee, it seems reasonable that this election should be given to the vendor, and no part of it to the vendee. But if the vendor has not the goods himself, but contracts with a third party for them, it is said, (but not, as we think, for good reasons,) that he now recovers only the difference between the market value and the contract price. But if his contract to buy was abso-

(*h*) Stanton *v.* Small, 3 Sandf. 230; McNaughter *v.* Cassaly, 4 McLean, 530; Whitmore *v.* Coats, 14 Mis. 9; Thompson *v.* Alger, 12 Metc. 428; Girard *v.* Taggart, 5 S. & R. 19. In Allen *v.* Jarvis, 20 Conn. 38, the defendant contracted with the plaintiff to manufacture a number of surgical instruments, of which the defendant was patentee. After they were finished, the defendant refused to accept them. The plaintiff recovered the full price agreed upon, on the ground that the instruments were of no value to him. *Storrs*, J., said: "The rule of damages, in an action for the non-acceptance of property sold or contracted for, is the amount of actual injury sustained by the plaintiff, in consequence of such non-acceptance. This is ordinarily the difference between the price agreed to be paid for it, and its value, where such price exceeds the value. If it is worth that price the damages are only nominal. But there may be cases where the property is utterly worthless in the hands of the plaintiff, and there the whole price agreed to be paid should be recovered. The present appears to us to be a case of this description. The articles contracted for were those for the exclusive right of making and vending which the defendant has obtained a patent. They could not be lawfully sold by the plaintiffs, and were, therefore worthless to them." Where the vendee gives notice before the day of delivery that he will not accept the goods, the measure of damages in an action against him by the vendor, is still the difference between the contract price and the market price, when they should have been delivered, and he cannot have them assessed at the market value of the goods at the time when the notice was given. Philpotts *v.* Evans, 5 M. & W. 475.

(*i*) Sands *v.* Taylor, 5 Johns. 395; Langfort *v.* Tiler, 1 Salk. 113, 6 Mod. 162; Jones *v.* Marsh, 22 Vt. 144; Wilson *v.* Broom, 6 La. Ann. R. 381; Gaskell *v.* Morris, 7 W. & S. 33; Boorman *v.* Nash, 9 B. & C. 145. In Sands *v.* Taylor, the defendants purchased of the plaintiffs a cargo of wheat. After accepting a part they refused to accept the remainder. After giving notice to the defendants the plaintiffs sold the wheat in their hands at auction. *Van Ness*, J., said: "Nothing, therefore, is more reasonable, than that the plaintiffs, who were not bound to store or purchase the wheat, should be permitted to sell it, at the best price that could be obtained. The defendants have no right to complain. Had they taken the wheat, as they ought to have done, a sale by the plaintiffs would not have been necessary. The recovery here is only for the difference between the net proceeds of that sale, and the price agreed upon in the original contract." Bement *v.* Smith, 15 Wend. 493;

lute and obligatory, and he had the goods in his control, so that his vendee might have them on demand, it might not be easy to discriminate this case from the other, on principle. (*j*)

If the goods are sold on credit, that is, if it is a part of the contract of sale, that payment shall be made at a future day, there can, of course, be no suit for the price until that day. But if it is also a part of the contract that a note or bill of exchange shall be given immediately, which is to be payable on that future day, if this be not given an action can at

Graham *v.* Jackson, 14 East, 498. In Bement *v.* Smith, the plaintiff built a carriage for the defendant, according to an agreement, tendered it to him, and on his refusal to accept it, deposited it with a third person on his account, giving the defendant notice of the deposit, and brought an action of *assumpsit*. It was held that the plaintiff was entitled to recover the price agreed upon. But in Laird *v.* Pim, 7 M. & W. 474, 478, *Parke*, B., said: "A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again." See also Dunlop *v.* Grote, 2 C. & K. 153; Thompson *v.* Alger, 12 Metc. 428, 443. In this last case, the contract was for the purchase of railroad shares, and they had already been transferred to the vendee, on the books of the company, and he refused, after the transfer, to receive them; the vendor was held entitled to recover the contract price; but the court were of opinion that if the refusal had preceded the transfer, the difference between the agreed price and the market value on the day of delivery would have been the measure of damages. Thompson *v.* Alger, 12 Met. 428. *Dewey*, J.: "The plaintiff is entitled to recover the whole amount stipulated to be paid for the stock. The argument against such recovery is, that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of the delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him. Such would have been the rule in this case, if nothing had been done to change the relations of the parties. If, for instance, the defendant had repudiated the contract, before any transfer of stock to him had been made on the books of the corporation, it might properly have applied here. But this is a case of somewhat peculiar character, in this respect. The contract of the vendor to sell to the defendant one hundred and eighty shares of railroad stock required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case, was a previous act; and when done, it passed the property on the books of the company to the defendant."

(*j*) For this distinction see Sedgwick on Damages, p. 283, citing Stanton *v.* Small, 3 Sandf. 230; McNaughten *v.* Casally, 4 McLean, 531. But we think this distinction is without foundation. The circumstance, in the first case, that the goods were not in the possession of the vendor, but only contracted for, was not alluded to by the court in assessing damages. The plaintiff only claimed what the court allowed. The cases seem to show that a vendor may, on default of vendee, not only elect to re-sell and charge the vendee for the loss on the re-sale, or sue for the contract price considering the goods as the vendee's; but may also elect to consider them as his own, the contract being rescinded, and sue for the special damage, i. e., the difference between the market value and the agreed price.

once be maintained for it; not only because it is a separate promise, but because, by the practice of merchants, this note or bill might be made, by the vendor's getting it discounted, the means of present payment. (*k*)

If the sale was with warranty, and an action is brought on a breach of the warranty, if the vendee may not rescind the contract and return the goods, — a question we have considered elsewhere (*l*) — he can have no other compensation than that which would make up the difference between what the goods are and what they ought to be. Nor is the price paid for the article any thing more than *primâ facie* evidence of the value which it should have had, if it is ever so much. The jury cannot assume that the warrantor only agreed that the thing purchased should be worth what was given for it, because the purchaser may have been induced by the low price to make the purchase. He has a right to have just such goods as the vendor agreed to sell, and compensation for the whole difference by which they fall short of this, without reference to the price paid for the goods. (*m*) He may

(*k*) Hanna *v.* Mills, 21 Wend. 90; Rinehart *v.* Olwine, 5 W. & S. 157; Hutchinson *v.* Reid, 3 Camp. 329. See also Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582. In the action for not giving the note, the measure of damages is the full price of the goods. Hanna *v.* Mills; Rinehart *v.* Olwine.

(*l*) Vol. 1, p. 474.

(*m*) Clare *v.* Maynard, 7 C. & P. 741, 6 A. & E. 519, *note;* Curtis *v.* Hannay, 3 Esp. 82; Woodward *v.* Thacher, 21 Vt. 580; Worthy *v.* Patterson, 2 Ala. 172; Slaughter *v.* McRae, 3 La. Ann. R. 453; Thornton *v.* Thompson, 4 Grattan, 121; Voorhees *v.* Earl, 2 Hill, 288; Freeman *v.* Clute, 3 Barb. 424; Comstock *v.* Hutchinson, 10 Id. 211. In Cary *v.* Gruman, 4 Hill, 625, the action was for a breach of a warranty, in the sale of a horse. The measure of damages was held to be the difference between what would have been its value as a sound horse and its value with the defects. *Cowen*, J., said, "The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to; a value which very likely depended on considerations which they alone could appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat this warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at fifty cents per bushel, warranted to be of good quality. It is worth one dollar if the warranty be true; but it turns out to be so foul that it is worth no more than seventy-five cents per bushel. The purchaser is as much entitled to his twenty-five cents per bushel in damages as he would have been by paying his dollar, or if he had given two dollars per bushel he could recover no more." The measure of damages was once held to be the difference between the price paid and the value of the article with defects. Caswell

also recover for the consequential injury he has sustained by reason of the breach of warranty, if it were the immediate, direct and natural consequence, but not otherwise. (*n*) Thus, if goods are warranted fit for a particular purpose, the purchaser is entitled to recover, in his action for breach of the warranty, what they would have been worth to him if they had conformed to the warranty. (*o*)

7. *Whether Expenses may be included in Damages.*

A question sometimes occurs in these cases, and also in many other actions where damages are demanded, as we have already intimated, which cannot always be answered by direct and unquestioned authority. It is, whether the plaintiff may include in his damages the expenses of litigation. Thus, if one sells a horse with warranty, and the buyer is notified by a third party that the horse is his, and requested to deliver it to him, and this the buyer refuses to do, and defends against an action in which this third person succeeds in proving the horse to be his property; and then the buyer resorts to the seller on his warranty, can he now claim from him the expenses of his unsuccessful defence, either on the ground that it was the direct and immediate consequence of the breach of warranty, or that it was for the benefit of the seller.

It is obvious, in the first place, that this question must be affected somewhat by the presence or absence of fraud, or any wilful wrong, on the part of the defendant; for if that comes into the case it would seem to enlarge the discretion of the jury as to the amount of damages, and also the equity of the

v. Coare, 1 Taunt. 566. The measure of damages in an action brought for a breach of an implied warranty of title, in the sale of a horse, is the price paid by the purchaser with interest thereon and the cost recovered of him or his vendee, in a suit brought by the actual owner. Armstrong *v.* Perry, 5 Wend. 535. In Coolidge *v.* Brigham, 1 Mete. 547, where the indorsements on a promissory note warranted genuine proved to be forged, it was held, that the measure of damages would be the difference between the amount of the note and its actual value, whatever that may be.

(*n*) In an action for the breach of warranty on a sale of a horse, the expense of selling him, and of keeping him for such reasonable time as may be necessary to effect a sale at the best advantage, is recoverable as special damage. Clare *v.* Maynard, 7 C. & P. 741; Ellis *v.* Clunnock, 7 C. & P. 169; McKenzie *v.* Hancock, Ryan & Moody, 436: Chesterman *v.* Lamb, 4 N. & M. 195, 2 A. & E. 129.

(*o*) Bridge *v.* Wain, 1 Stark. 504.

plaintiff's claim. But if, supposing no wilful wrong to be alleged or shown, and therefore that both parties are equally innocent, if we then say that the plaintiff may always reclaim his expenses of litigation, this would give him the power of subjecting the defendant to the heavy costs of defending against a suit where there was no defence, which the defendant never would have defended, nor the plaintiff, had he but known that he was doing so out of another's purse. But if we say that these expenses shall never be recovered, the plaintiff must then either be justified in abandoning the thing he bought to the first adverse claimant, and the mere fact of the claim be held enough to establish his right to sue on the warranty, which would be absurd, or else he would be bound to maintain at his own cost a title which he had paid for and which another had warranted.

In truth it would be impossible to lay down a universal rule, because the question as it arises in each case must be determined by the merits and circumstances of that case. But through all of them the principle of compensation must be regarded; and this would lead to the conclusion that wherever the litigation was entered into by the buyer, not only in good faith, but on reasonable grounds, and it could be viewed as a measure of defence proper for the interests both of buyer and seller, and, perhaps, when due notice of the claim, the action and the proposed defence were given to the warrantor, there the plaintiff should be allowed the expenses of the defence in his damages, and otherwise, not. For practical purposes, it would be, we think, of great importance for a buyer threatened with the loss of his purchase by an adverse claimant, to give notice to his seller and warrantor, somewhat on the old principle of voucher. For if the seller did not choose to defend, the buyer might then safely abandon the property, unless he preferred to defend his title on his own account. And if the seller took notice and defended the suit, the buyer would either have his title confirmed without costs to himself, or an unquestionable claim on the warranty. (*p*) And, for the same reasons, it would doubtless be

(*p*) Blasdale *v.* Babcock, 1 Johns. 517; Coolidge *v.* Brigham, 5 Metc. 68. In Lewis *v.* Peake, 7 Taunt. 153, the plaintiff bought a horse of the defend-

expedient for any party to give notice, who is to look to another for compensation for property taken from him by a third party, on other grounds than those of warranty.

8. *When Interest is included.*

There is another element which enters into the damages given for breach of contract, for the purpose of making these damages compensation; and this is interest. In general, where the injury complained of consists in the non-payment of money, the amount unduly withheld, together with the interest on that amount, during the period of the withholding, makes up the whole compensation, because the law assumes that interest, or the money paid for the use of money, is the exact measure of the worth of money. This would be very nearly true, in fact, of the rate of interest actually paid in the market, if this were wholly unaffected by the usury laws. But as the law assumes that the rate of interest which it allows is that which, on the whole, interest ought to be, and indeed fixes the rate on that ground, where it differs so much in different parts of this country, it must assume in every case that this standard measures the use which the plaintiff might have made of his money. The questions which arise in relation to interest, we have already considered in our previous chapter on interest and usury.

ant, with warranty, and relying thereon sold it to one Dowling, with a warranty. The plaintiff, being sued by Dowling for a breach of the warranty, gave notice of the action to the defendant, and, as he received no answer, defended the action. Dowling recovered the price of the horse and 88*l.* costs. The plaintiff, in an action against the defendant for a breach of the warranty, was held entitled to recover the costs which he had paid in the suit brought by Dowling. *Gibbs*, C. J., said: "The plaintiff was induced by the warranty of the defendant, to warrant the horse to a purchaser; he gave notice to the defendant of the action, and receiving no directions from the defendant to give up the case, he proceeded to defend, and was cast; those costs and damages are therefore a part of the damages which the plaintiff has sustained by reason of the false warranty found against the defendant. I therefore am of opinion, that the plaintiff was entitled to recover these damages." But the expense of defending a suit beyond the taxed costs cannot, it seems, be recovered. Armstrong *v.* Percy, 5 Wend. 535; *ante*, p. 441, n. (*i.*) And the taxed costs cannot be recovered, even if notice of the suit have been given, if the defect in the thing warranted could have been discovered on a reasonable examination, so that the defence of the action was rash and improvident. Wrightup *v.* Chamberlain, 7 Scott, 598; 2 Jurist, 328. See Penley *v.* Watts, 7 M. & W. 601, per *Parke*, B.

SECTION VIII.

OF THE BREACH OF CONTRACT TO PAY MONEY OR GOODS.

If a note or written promise be to pay so much money, but in goods specified, and at a certain rate, and the promise is broken, it is not quite settled whether the law will regard this as a promise to pay money, or deliver these goods; and it may be a very important question if the goods have varied much in value. Thus if one fails in his promise to pay one thousand dollars in flour, at five dollars a barrel, and when the flour should be delivered it is worth six dollars a barrel, and, not being delivered, an action is brought, the question is whether the defendant should pay one thousand dollars, or the worth of two hundred barrels of flour at six dollars each, that is, twelve hundred dollars. The true question is whether it was intended that the promisor might elect to pay the money or deliver the articles; or, in other words, whether it was agreed only that he owed so much money, and might pay it either in cash or goods, as he saw fit. There might be something in the form of the promise, in the *res gestæ*, or in the circumstances of the case, which by showing the intention of the parties would decide the general question, but in the absence of such a guide, and supposing the question to be presented merely on the note itself, as above stated, we should say that the more reasonable construction would be that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as that price then indicated. And on a breach of this contract, the promisor should be held to pay, as damages, the value of so much of such goods, at their increased or diminished price. (*q*) But if the pro-

(*q*) Mason *v.* Philips, Addison, 346; Price *v.* Justrove, Harper, 111; Cole *v.* Ross, 9 B Mon. 393; Clark *v.* Pinney, 7 Cow. 681; Walton *v.* Craig, 2 Bibb, 584; McDonold *v.* Hodge, 5 Haywood's Term R.; Edgar *v.* Bois, 11 S. & R. 445, per *Gibson*, J. See Wilson *v.* George, 10 N. H. 445. In Meason *v.* Philips, the defendant, the lessee, covenanted to pay rent in good merchantable grain; wheat, at four shillings; rye, at three shillings; and corn, at two shillings and six pence per bushel. It was *held*, that the damages were to be ascertained by valuing the grain at the current prices, at the time of delivery, with in-

mise be only to pay one thousand dollars at a certain time,

terest from that time. In Cole *v.* Ross, 9 B. Mon. 393, it was held that "a covenant to pay $3,333.33, *payable* in good merchantable pig metal, delivered on the bank in Greenupsburg, at twenty-nine dollars per ton, could not be discharged by the payment of $3,333.33 on the day appointed for the payment." Per *Sampson*, J.: "The expression '*payable* in good merchantable pig metal,' clearly points out the thing which is to be paid; it is not of the same import with the expression *may be paid* in pig metal. The latter, if used, would have implied an election to pay in the thing named or not, as it might suit the convenience of the obligors; the former in direct and positive language, makes the amount payable in the thing specified, and shows that it was really a contract for pig metal, and not for money, which might be paid by the delivery of the article named; and that the sum mentioned was merely the medium by which the quantity of the thing contracted for was to be ascertained, according to its stipulated value per ton." There is no substantial difference between the writing sued on in this case, and the one upon which the suit was brought, in the case of Matton *v.* Craig, (2 Bibb, 584.) In the last-named case, the note was for the payment of 'eighty-nine dollars, to be discharged in good merchantable brick, common brick at four dollars per thousand, and sand brick at five dollars per thousand.' The court decided that the note was not for the payment of money, but for the payment of brick. It is the opinion of a majority of the court, (Judge *Graham* dissenting.) that the note in this case was payable alone in pig metal, and could not be discharged by paying the sum mentioned in money." But there are authorities, of perhaps equal weight, which held that a note promising to pay a certain sum, in specific articles at a given price, may be discharged by the delivery of the articles, or by the payment of the sum stated, at the debtors' election; but, after the time fixed for delivery has elapsed, they become obligations for the payment of that sum. Pinney *v.* Gleason, 5 Wend. 393, 5 Cow. 152, 411; Brooks *v.* Hubbard, 3 Conn. 58; Perry *v.* Smith, 22 Verm. 301. In Pinney *v.* Gleason, 5 Wend. 397, the note was in this form: "For value received, I promise to pay A. B. $79,50 on, &c., in salt, at fourteen shillings per barrel." Per Ch. *Walworth*: "*Pothier* says these agreements for paying anything else in lieu of what is due, are always presumed to be made in favor of the debtor, and therefore he has always a right to pay the thing which is actually due, and the creditor cannot demand anything else; and he puts the case of a lease of a vineyard at a fixed rent, expressed in the usual terms of commercial currency, but payable in wine. In such a case, he says, the lessee is not obliged to deliver wine, but may pay the rent in money. 2 Ev. Poth. 347, N. 497. Chipman, in his valuable treatise on the law of contracts for the delivery of specific articles, puts the case of a note for $100, payable in wheat, at 75 cents per bushel, and concludes that it comes within the principle referred to by *Pothier*, and that the debtor may pay the $100 in money, *or* in wheat at the price specified. He says the nature of the contract is this: The creditor agreed to receive wheat instead of money, and as the parties concluded the price of wheat at the time of payment would be 75 cents per bushel, to avoid disputes about the price they fixed it at 75 cents in the contract. If at the time fixed for payment, wheat be at 50 cents a bushel, the debtor may pay it in wheat at the rate of 75 cents. That, if the parties had intended the risk in the rise and fall of the wheat should be equal with both, the contract would have been simply for the payment of a certain number of bushels. Chip. on Con. 35. This construction of the contract appears to be rational, and is probably in accordance with the practice of those parts of the country where these contracts are most frequently made. The language is certainly not the best which could be used to express such an intent; and probably if the contract were drawn by a lawyer he would put it in the alternative, giving the debtor the option in express terms, to pay the debt in money, or in wheat at the fixed rate per bushel. But certainly if the intention of the parties was that a certain number of bushels of wheat should be absolutely delivered in payment, a lawyer would draw the note for so many bushels of wheat in direct terms." Where notes are given for a specified sum, payable in bank-notes or

in flour, then this sum is to be paid, either in flour or in money, at the election of the payor. (*r*).

SECTION IX.

OF NOMINAL DAMAGES.

As damages are compensation for some actual injury sustained, it might seem that where a wrong was done, but no actual injury sustained, there could be no action for damages, for there is nothing which requires compensation. It would seem to be, in the language of the law, *injuria sine damno*. And there are ancient and strong authorities for the rule, that no action for damages will lie unless an actual injury is either sustained, or is inevitable. (*s*) But there is also high authority, and, in our view, decisive authority, for the assertion, that every injury imports a damage. (*t*) This

other choses in action, the measure of damages has been held to be the value of such paper at the time the notes become due. Smith *v.* Dunlap, 12 Illinois, 184; Clay *v.* Huston, 1 Bibb. 461; Anderson *v.* Erving, 3 Litt. 245; Phelps *v.* Riley, 3 Conn. 266; Coldren *v.* Miller, 1 Blackf. 296; Vanblect *v.* Adair, 1 Id. 346; Gordon *v.* Parker, 2 S. & M. 485; Hixon *v.* Hixon, 7 Humph. 33; Robinson *v.* Noble, 8 Peters, 181.

(*r*) Brooks *v.* Hubbard, 3 Conn. 60, per *Hosmer*, C. J.; Mettler *v.* Moore, 1 Blackf. 342.

(*s*) 19 H. 6, 44; Waterer *v.* Freeman, Hobart, 267 (*a*,) per *Hobart*, C. J.; Ashby *v.* White, 2 Lord Raymond, 938; 1 Smith, Ld. Cas. 105, per Curiam, Lord *Holt*, *dissentiente*.

(*t*) Ashby *v.* White, 2 Lord Raymond, 938, 955; 1 Salk. 19; 1 Smith's Ld. Cases, 105, per Lord *Holt;* Williams *v.* Mostyn, 4 M. & W. 145, 153, per *Parke*, B.; Mellor *v.* Spateman, 1 Wm. Saunders, 346, (*a.*) note 2; In Webb *v.* Portland Manuf. Co. 3 Sumn. 189, 192, *Story*, J., said: "I can very well understand, that no action lies in a case, where there is *damnum absque injuriâ*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can be correctly said, in a legal sense, that an action will not lie, even in a case of wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it, and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. . . So long ago as the great case of Ashby *v.* White, (2 Lord Raym. R. 938; S. C. 6 Mod. R. 45; Holt's R. 524,) the objection was put forth by some of the judges, and was answered by Lord *Holt*, with his usual ability and clear learning; and his judgment was supported by the House of Lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. [London: Saunders and Benning, 1837.] In this last printed opinion, (p. 14,) Lord *Holt* says: "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it."

injury sometimes consists in the denial of a right, or of property, which is implied by the wrongful act, and not in any consequences which have yet flowed, or can be immediately apprehended from it. And it often happens that an action is brought, sounding only in damages, but intended merely to ascertain and establish a right, without any thought of compensation. For this purpose any verdict and judgment, for the smallest sum, is as effectual in law as if for a larger. And it is now the established practice in England and in this country, to give a plaintiff damages if he succeeds in proving that the defendant has broken his contract with him, or has trespassed upon his property, or in any way invaded his rights. But if no actual injury has been sustained beyond that which the verdict and judgment will themselves correct, and the case does not call for exemplary damages, the jury would then be directed to give nominal damages; that is, a sum of insignificant value, but called damages. (*u*) Cases of this class have sometimes been decided on the ground that nominal damages may be recovered for only probable, or even possible damages. (*v*)

(*u*) Thus the owner of a several fishery recovered nominal damages of the defendant, in an action of trespass, for fishing in it, although no fish were taken. Patrick *v.* Greenway, 1 Saund. 346, *b.* So nominal damages may be recovered for an unlawful flowing of the plaintiff's land, although no actual damage is done. Chapman *v.* Thames Manuf. Co. 13 Conn. 269; Whipple *v.* Chamberlain Manuf. Co. 2 Story, 661; Pastorius *v.* Fisher, 1 Rawle, 27; Ripka *v.* Sergeant, 7 W. & S. 9. So they may be recovered for the diversion of a watercourse, without proof of actual damage. Webb *v.* Portland Manuf. Co. 3 Sumn. 189; Plumleigh *v.* Dawson, 1 Gilman, 544; Dickinson *v.* The Grand Junction Canal Co. 9 Eng. L. & Eq. 513, 7 Exch. 282. The principle upon which these cases rest, is thus stated by Sergeant *Williams*, Mellor *v.* Spateman, 1 Saund. 346, *b.*, note (*b.*) "Wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific injury."

(*v*) Wells *v.* Watling, 2 W. Bl. 1223; Weller *v.* Baker, (the case of the Tunbridge Well-Dippers,) 2 Wils. 414; Allaire *v.* Whitney, 1 Hill, 484. Generally, in an action for a breach of a contract, the breach, but no actual damage, being proved, nominal damages will be awarded. Boorman *v.* Brown, 3 Q. B. 515, 11 Cl. & Fi. 1; Marzetti *v.* Williams, 1 B. & Ad. 415. So, if an agent violate instructions, although no actual damage be shown. Frothingham *v.* Everton, 12 N. H. 239; Blot *v.* Boiceau, 3 Comst. 78, 84. So if a sheriff neglect his duty, although no actual damage arise. Laflin *v.* Willard, 16 Pick. 64; Glezen *v.* Rood, 2 Mete. 490; Bruce *v.* Pettengill, 12 N. H. 341. The Supreme Court of Vermont seems to have gone very far in refusing to sustain an action of trespass for the taking of personal property. In Paul *v.* Slason, 22 Verm. 231, the defendant, a sheriff, attached hay, belonging to the plaintiff, and in removing it, used the plaintiff's pitchfork. For the taking of this among other things the action of trespass was brought The court below "charged the jury, that if they found that it was merely used for a portion of a day in removing the plain-

And sometimes a jury uses the same means of expressing its opinion that the plaintiff has failed *substantially*, although he has succeeded *formally*. As when in slander or assault and battery, the jury find for the plaintiff, but assess damages at a few cents. (*w*)

SECTION X.

OF DAMAGES IN REAL ACTIONS.

Thus far we have treated only of damages for the breach of personal contracts; or for personal torts. In real actions, strictly speaking, damages were not demanded or given at common law; (*x*) the old writ of *estrepement*, after judgment, gave compensation in some cases; (*y*) but damages were given by early statutes, and properly belong to all mixed actions, and to personal actions relating to land. (*z*) In ejectment they are in general nominal only; (*a*) and a subsequent action of trespass is brought for the mesne profits. (*b*) But where the plaintiff has a title and estate

tiff's property, thus attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for such use." This charge was sustained, and *Polard*, J., in delivering the opinion of the court said: "It is true, that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property, and gives nominal damages. This goes upon the ground, that either some damage is the *probable* result of the defendant's act, or that his act would have effect to injure the other's *right*, and would be evidence in future in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done; because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's right, for the purpose of injury, an action will lie though no actual damage be done; the law presumes damage on account of the unlawful intent. But it is believed that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right or possession, is shown, and when not only all *probable*, but all *possible* damage is expressly disproved."

(*w*) Where the plaintiff had destroyed her own character by her dissolute conduct, the jury in an action of slander, may give nominal damages. Flint *v.* Clark, 13 Conn. 361.

(*x*) Sayer on Damages, p. 5; Stearns on Real Actions, 390.

(*y*) 2 Inst. 329; 3 Bl. Comm. 225; Sayer on Damages, 34.

(*z*) 20 Hen. III. c. 3; 52 Hen. III. c. 16; 6 Ed. I. c. 1; Pilfold's case, 10 Co. 115; Stearns on Real Actions, 389, *et seq.*

(*a*) Van Alen *v.* Rogers, 1 Johns. Cas. 281; Harvey *v.* Snow, 1 Yeates, 156.

(*b*) Van Alen *v.* Rogers, 1 Johns. Cas. 281; Adams on Ejectment, 328. In some States, mesne profits are recovered in the action of ejectment. Boyd *v.* Cowan, 4 Dallas, 138; Battin *v.* Bigelow, 1 Peter's C. C. 452; Starr *v.* Pease, 8 Conn. 541; Denn *v.* Chubb, 1 Coxe,

which would maintain his action, and the estate terminates or the title expires while the action is pending, actual damages may be recovered, including mesne profits. (*c*) Sometimes trespass for mesne profits is brought, not only for them, but to try the title to the estate. (*d*)

The question, what damages may be recovered, is not only determined in this as in other cases by the principle of compensation, but this principle is carried very far. Thus, the rent of the land is barely *primâ facie* evidence of its annual value or profit, and the jury may exceed it very much, indeed to whatever extent is necessary to give the plaintiff adequate compensation. (*e*) The damages have been held to be "as uncertain as in an action of assault;" and because the action is in fact as well as form for a tort, bankruptcy is no sufficient plea in defence. (*f*) So, to make up the value, the rents have been allowed and interest upon them, (*g*) and the costs of the litigation by which the title was established. (*h*)

The common law, unlike the Roman law and the modern codes founded upon it, gives to a *bonâ fide* holder without title, no claim for his improvements against the true owner. If he loses the land, he loses with it all the improvements which have become fixed to the realty. (*i*) In many of our States the civil law principle has been adopted

(N. J.) 466; Beach *v.* Beach, 20 Verm. 83; Edgerton *v.* Clark, 20 Id. 264. But the recovery of mesne profits in the action of ejectment has been held to be no bar to a subsequent action for trespass for wanton injuries. Waller *v.* Hitchcock, 19 Verm. 634. See Gill *v.* Cole, 1 H. & J. 403.

(*c*) Thurstout *v.* Grey, 2 Strange, 1056; Robinson *v.* Campbell, 3 Wheat. 212; Wilkes *v.* Lion, 2 Cow. 333; Brown *v.* Galloway, 1 Peters, C. C. 291, 299; Alexander *v.* Herr, 1 Penn. St. 537. See Stackdale *v.* Young, 3 Strobh. 501.

(*d*) Bullock *v.* Wilson, 3 Porter, 382; Sunter *v.* Lehre, 1 Tread. (So. Car.) 102. In Massachusetts, both the land and the mesne profits are recovered by a writ of entry. Rev. St. ch. 101; Washington Bank *v.* Brown, 2 Mete. 293.

(*e*) Goodtitle *v.* Tombs, 3 Wils. 118; Dewey *v.* Osborne, 4 Cow. 329; Drexel *v.* Man, 2 Penn. St. 271, 276; Adams on Eject. 338.

(*f*) Goodtitle *v.* North, Doug. 584, per *Buller*, J.

(*g*) Jackson *v.* Wood, 24 Wend. 443.

(*h*) Astin *v.* Parkin, 2 Burr. 665. The rule appears to be that where the costs have been taxed in the ejectment suit, nothing more than those can be recovered. Doe *v.* Davis, 1 Esp. 358; Doe *v.* Hare, 4 Tyrw. 291. See *ante*, page 441, n. (*i*.) But where they have not been taxed, as in case of a judgment by default, or where there is a writ of error, evidence may be introduced to show their amount. Nowell *v.* Roake, 7 B. & C. 404; Brooke *v.* Bridges, 7 J. B Moore, 471; Doe *v.* Huddart, 5 Tyrw. 846, 2 C. M. & R. 316; Baron *v.* Abeel, 3 Johns. 481. See Alexander *v.* Herr, 11 Penn. St. 537.

(*i*) Powell *v.* M. & B. Manf. Co. 3 Mason, 369; 2 Kent's Comm. 334–338.

and statutory provisions made, by which such defendant, being ousted by a better title, may recover the value of his improvements, as assessed by a jury of the vicinage. (*j*) Besides this, however, it has been held in this country, that a holder of land in entire good faith, if ousted by a better title of which he was ignorant, and afterwards called upon to refund the mesne profits, may set off his improvements against the mesne profits. (*k*). But such improvements must be in their nature permanently beneficial to the estate. (*l*) In that case a Court of Equity will sustain, against the actual owner, after recovery of the premises, a bill brought by a *bonâ fide* possessor, for the value of his improvements. (*m*)

A doweress from whom land is withheld may recover damages. (*n*) But when the suit is brought for land upon

(*j*) Mass. R. St. ch. 101; Ohio R. St. ch. 77; N. H. R. St. ch. 190; 2 Kent's Comm. 335, 336; Lamar *v.* Martin, 13 Ala. 31; Bailey *v.* Hastings, 15 N. H. 525.

(*k*) Murray *v.* Gouverneur, 2 Johns. Cas. 438, 441; Jackson *v.* Loomis, 4 Cowen, 168; Green *v.* Biddle, 8 Wheat. 1, 81, citing Coulter's Case, 5 Co. 30; Hylton *v.* Brown, 2 Wash. C. C. 165; Dowd *v.* Fawcett, 4 Dev. 92, 95; Beverly *v.* Burke, 9 Geo. 440; Burrows *v.* Peirce, 6 La. Ann. R. 303, 308.

(*l*) Worthington *v.* Young, 8 Ohio, 401; Mathews *v.* Davis, 6 Humph. 324.

(*m*) Bright *v.* Boyd, 1 Story, 494, 2 Id. 605; Herring *v.* Pollard, 4 Humph. 362; Mathews *v.* Davis, 6 Id. 324; Martin *v.* Atkinson, 7 Geo. 228; Bryant *v.* Hambrick, 9 Geo. 133; 2 Story's Eq. Juris. §§ 799, *b.* 1237, 1238. But see Putnam *v.* Ritchie, 6 Paige, 390, 403.

(*n*) The law on this subject, as it stood under the statute of Merton, was clearly stated by *Booth*, J., in Layton *v.* Butler, 4 Harrington, 507, 509. "Dower *unde nihil habet* is a real action, in the nature of a writ of right; and therefore, by the common law, no damages were recoverable by the wife for its detention. By the statute of Merton it was enacted, that where widows were efforced of their dower, and cannot have it *without plea*, they who efforced them of their dower, of the lands *whereof their husbands died seised*, shall, upon the recovery thereof by such widows, yield them damages, that is to say; the value of the whole dower, (namely, the one third of the annual profits of the land) from the death of the husband unto the day that the widow, by the judgment of the court, has recovered seisin of her dower. Where the husband has aliened the land, no damages can be recovered by the widow against the alienee, without a demand of dower and a refusal; and then only from the time of making the demand. Where the husband dies seised of the inheritance, as the possession immediately devolves on the heir, damages may be recovered against him from the time of the husband's death. But according to Co. Litt. 32, b., the heir may save himself from damages, if he comes into court upon the summons the first day, and pleads that he has always been ready and yet is ready to render dower, and prays that she may not have damages; in which case if the wife has not requested her dower, she loses her damages. But if to the plea she replies a demand of her dower, and issue is thereupon taken and found for her, she recovers damages from the death of her husband. If the heir succeeds on the issue, he is saved from damages from the time of the husband's death; but still the widow recovers damages from the test of the original writ, which in law is considered as a demand. So, too, in the case of the husband's alienee, damages are given from the time of the suing out of the writ, although no demand was in fact made.

which valuable improvements have been made, by building houses, for instance, either by the alienee of the husband or by the heir, it is not positively settled whether she has damages to cover her claim to dower in these improvements, or must be limited to her dower in the land as the purchaser took, or the heir inherited it. There are certainly strong reasons, if not conclusive authority, in favor of the principles applied to this question in some of our courts; namely, that where the heir adds improvements to the estate, the widow shall have her dower in them; but not in the improvements made by a purchaser; (*o*) but that she shall have, against a purchaser, her dower in the increased value of the land, caused by the general growth and prosperity of the country. (*p*)

It seems necessary, therefore, to entitle the widow to damages, either against the alienee or the heir, that she should make a demand of her dower previous to bringing her action of dower *unde nihil habet*. By the damages in this action are meant the one third of the annual profits of the land, beyond all reprises, (that is, after deducting land-taxes, repairs, &c.,) and also, such damages as the wife has sustained by the detention of her dower, which in the inquisition taken upon a writ of inquiry, are usually assessed severally; although it is said, damages may be given generally, without finding the value of the land." See Watson *v.* Watson, 10 C. B., 1 E. L. C. 371. In many States the damages for the detention of dower are regulated by statutes. N. Y. Rev. St. vol. 2, pt. 2, tit. 3, p. 28; Mass. Rev. St. ch. 102; 4 Kent's Com. 65. It seems that in some of the States the statute of Merton is held not to be in force, and no damages are given. Hayward *v.* Cuthburt, 1 McCord, 386; Bank of U. S. *v.* Dunseth, 10 Ohio, 18.

(*o*) It is well settled that a widow is entitled to dower out of any improvements that may have been made by the heir previous to the assignment. Co. Lit. 32. a.; 1 Roper on Husband and Wife, 346, 347; Catlin *v.* Ware, 9 Mass. 218; Powell *v.* M. & B. Manuf. Co. 3 Mason, 346, 365; but not out of any improvements made by the alienee of her deceased husband. Gore *v.* Brazier, 3 Mass. 544; Ayer *v.* Spring, 9 Id. 8, 10; Id. 80; Stearns *v.* Swift, 8 Pick. 532; Woolbridge *v.* Wilkins, 3 How. (Miss.) 360; Humphrey *v.* Phinney, 2 Johns. 434; Wilson *v.* Oatman, 2 Blackf. 223; Mahony *v.* Young, 3 Dana, 588; Leggett *v.* Steele, 4 Wash. C. C. 305; Barney *v.* Frowne, 9 Ala. 901; 1 Roper on Husband and Wife, 346. If the land is impaired in value between the time of the husband's death and the assignment by the heir, the widow is only entitled to dower out of its value at the time of the assignment. Co. Litt. 32 a.; Hale *v.* James, 6 Johns. Ch. 258, 260, per Chancellor *Kent;* Powell *v.* M. & B. Man. Co. 3 Mason, 347, 368, per *Story*, J. But if the alienee has impaired the value of the premises, the widow seems to be entitled to dower, according to the value at the time of the alienation. Hale *v.* James, 6 Johns. Ch. 258.

(*p*) This distinction between the increase in value arising from extrinsic causes and that arising from improvements made by the alienee of the husband, appears to have been first taken by *Parsons*, C. J., in Gore *v.* Brazier, 3 Mass. 523, 544. It was adopted in Thompson *v.* Marrow, 5 S. & R. 289, and, after much consideration, by *Story*, J., in Powell *v.* M. & B. Manf. Co. 3 Mason, 347, 365, and is sanctioned by Chancellor *Kent*, 4 Kent's Comm. 68. See also Shirtz *v.* Shirtz, 5 Watts, 225; Dunseth *v.* The Bank of U. S. 6 Ohio, 76. But it has been held otherwise in Todd *v.* Baylor, 4 Leigh, 498, and in New York, under a statute. Walker *v.* Schuyler, 10 Wend. 480; Humphrey *v.* Phinney, 2 Johns, 484; Dorchester *v.* Coventry, 11 Johns. 510, Shaw *v.* White, 13 Johns. 179.

Where an action is brought for wrongful interference with real estate, or with the occupation or enjoyment of it, and the action not only sounds in tort but is for actual injury, there it seems quite settled, and illustrated by a variety of cases in this country, that compensation may be recovered by way of damages, for all the direct and natural consequences of the injury. (*q*)

If the action be brought on the common covenants of a deed, the rules in respect to compensation seem to differ, according as it is one or another of these covenants which has been broken. The covenant that the grantor is lawfully seised, and that he has good right to convey, (which has been held the same with the covenant of seisin,) (*r*) and that the premises are free from incumbrances, are broken as soon as the deed is executed, if the grantor has no seisin, or the land be encumbered. (*s*) And if an action is brought on the covenants, that the grantor is lawfully seised, although the plaintiff may prevail, by proving the actual breach of the covenant, as that the grantor had no seisin, he will have, it is said, as damages, only the price he has paid, and interest; on the ground that he has lost no land, because, if the covenants were broken when the deed was given, it follows that no land ever passed to him. (*t*) And, if it is made to appear that the plaintiff has lost less, as by a purchase at a low price of an

(*q*) The general principles, in regard to the immediate and remote consequences of an unlawful act, apply to this class of cases. See *ante*, p. 457, note (*r*). In White *v.* Moseley, 8 Pick. 356; in an action of trespass *quare clausum fregit*, for entering the plaintiff's close and destroying a mill-dam, the plaintiff recovered for "the interruption to the use of the mill and the diminution of the plaintiff's profits on that account." See Dickinson *v.* Boyle, 17 Pick. 78. In Barnum *v.* Vandusen, 16 Conn. 200, where the defendant's sheep entered upon the plaintiff's land and communicated an infectious disease to his sheep, it was held that the plaintiff was entitled to recover, in an action of trespass, for the loss of the sheep and for the trouble and expense in taking care of them. See Anderson *v.* Buckton, Strange, 192. In Johnson *v.* Combs, 3 Har. & Mellen. 510, where the defendant entered upon the plaintiff's land and with clubs drove away eight negroes, it was held, in action of trespass *quare clausum fregit*, that the plaintiff could recover for injuries to his crops, consequent upon the driving away of his negroes. In an action for entering upon the plaintiff's close, damages may be recovered for debauching the plaintiff's daughter and servant. See Bennett *v.* Allcott, 2 T. R. 166; Ream *v.* Rank, 3 S. & R. 215.

(*r*) Willard *v.* Twitchell, 1 N. H. 177, 458; Rickert *v.* Snyder, 9 Wend. 416, 421. But the covenants are not in all respects synonymous, as a party may have a good right to convey, and yet not be seised of a legal estate. Rawle on Covenants for Title, 127.

(*s*) See *ante*, vol. 1, p. 199.

(*t*) Staats *v.* Ten Eyck, 3 Caines, 111; Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Id. 433; Caswell *v.* Wendell, 4 Id. 108; Smith *v.* Strong, 14 Pick.

outstanding title, he will recover less. (*u*) If the grantor has acquired a title which will enure to the grantee by way of estoppel, the damages will be only nominal. (*v*) But it has been also held, that a release of land without warranty, by the grantee to a third person, will not prevent the grantee's recovery of full damages. (*w*)

The covenants that the grantee shall have quiet enjoyment, and that the grantor will warrant and defend against all lawful claims, are, in general, broken only by actual ouster, (*x*) and then such damages will be recovered, according to the rule laid down in one of the earliest cases on this subject, as shall give to the injured party full and adequate compensation. (*y*)

But if we suppose a case where land is conveyed with warranty, the grantor and grantee both believing the title to be good, and there is no taint or suspicion of fraud, and the land rises greatly in value, either by the increased worth of real estate in that vicinity, or by expensive improvements made by the grantee, and then the grantee is ousted, and comes on the warranty against the grantor, the question arises, what is the compensation to which the plaintiff is entitled. It is obvious that an error has been made by which some innocent party must lose much; and it cannot be said that this error is to be imputed as a wilful fault to one party more than to the other. If the covenanter is bound to make good the value of all that the grantee loses, "no man," says Kent, "could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin." (*z*) But if not, the innocent grantee may lose by a failure of a title, for

128; Stubbs *v.* Page, 2 Greenl. 378; Mitchell *v.* Hazen, 4 Conn. 495; Weiting *v.* Nissley, 13 Penn. St. 650, 655; Seamore *v.* Harlan, 3 Dana, 415; Martin *v.* Long, 3 Mis. 276; Clark *v.* Parr, 14 Ohio, 118. See also Parker *v.* Brown, 15 N. H. 176; Cox *v.* Strode, 2 Bibb, 273. In an action for the breach of this covenant damages cannot be recovered for improvements or the increased value of the land. Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns. 1; Bennett *v.* Jenkins, 13 Johns. 50; Bender *v.* Stoneberger, 4 Dallas, 436; Weiting *v.* Nissley, 13 Penn. St. 605.

(*u*) Tanner *v.* Livingston, 12 Wend. 83; Spring *v.* Chase, 22 Maine, 505; Leffingwell *v.* Elliott, 8 Pick. 455, 10 Id. 204; Loomis *v.* Bedel, 11 N. H. 74, 87.

(*v*) Baxter *v.* Bradbury, 20 Maine, 260.

(*w*) Cornell *v.* Jackson, 3 Cush. 506.

(*x*) Rawle on Covenants for Title, 182–339.

(*y*) Gray *v.* Briscoe, Noy. 142; Puncombe *v.* Rudge, Yelv. 139, Hobart, 3, and *note*, in Williams's edition.

(*z*) Staats *v.* Ten Eyck, 3 Caines, 114, 115.

the warranty of which he had paid a valuable consideration, the greater part of the value of his estate. In some States the value of the estate at the time of the conveyance is the measure of damages; and where this value determines in the assessment of damages, it is itself determined, generally, at least, by the amount of the consideration paid, with interest. But if mesne profits have been received by the grantee, they will, in general, be held equivalent to the interest; and then no interest will be allowed to the grantee, or only that which is commensurate with his liability for the mesne profits to the holder of the paramount title; and therefore he can recover interest only for six years. (*a*) In some States the value of the land at the time of the eviction, is the measure of damages. (*b*) There seem to be intimations of a distine-

(*a*) Where the value of the land at the time of the conveyance is taken into account in assessing damages, that value is in general determined by the amount of the consideration paid, and interest is allowed upon that sum; but if mesne profits have been received by the grantee, those will be held equivalent to the interest, and, in that case, the allowance of interest to the grantee will only be commensurate with his liability for the mesne profits to the holder of the title paramount, that is, he can, in general, recover interest for six years only. Bennett *v.* Jenkins, 13 Johns. 50; Staats *v.* Ten Eyck, 3 Caines, 111; Baxter *v.* Ryerss, 13 Barb. 267; Clark *v.* Parr, 14 Ohio, 118. The amount of the consideration-money with interest has been held to be the measure of damages, in New York; Pitcher *v.* Livingston, 4 Johns. 1; Bennett *v.* Jenkins, 13 Id. 50; Kinney *v.* Watts, 4 Wend. 38; Kelly *v.* Dutch Church of Schenectady, 2 Hill, 105, 115; Baxter *v.* Ryerss, 13 Barb. 267; — in Pennsylvania; Brown *v.* Dickerson, 12 Penn. St. 372; Bender *v.* Fromberger, 4 Dall. 436, 441; King *v.* Pyle, 8 S. & R. 166; — in New Jersey; Holmes *v.* Sinnickson, 3 Green, 313; Stewart *v.* Drake, 4 Halst. 139, 142; — in Virginia; Stout *v.* Jackson, 2 Rand. 132; Shrelkeld *v.* Fitzbugh, 2 Leigh, 451, 463; Jackson *v.* Turner, 5 Id. 119; Haffey *v.* Birchetts, 11 Id. 83, 88; *contrà*, Mills *v.* Bell, 3 Call, 320; — in South Carolina; Furman *v.* Elmore, 2 Not. & McCord, 189; Wallace *v.* Talbot, 1 McCord, 466, 468; Pearson *v.* Davis, 1 McMull. 37; — *Contrà*, Tiber *v.* Parsons, 1 Bay, 19; Witherspoon *v.* Anderson, 3 Dessau, 245; — in North Carolina; Phillips *v.* Smith, 1 Car. Law Repos. 475; Wilson *v.* Forbes, 2 Dev. 30; — in Ohio; King *v.* Kerr, 5 Ohio, 154; Foote *v.* Burnet, 10 Id. 317; Clark *v.* Parr, 14 Id. 118; — in Georgia; Davis *v.* Smith, 5 Geo. 274; — in Kentucky; Cox *v.* Strode, 2 Bibb, 273; Hanson *v.* Buckner, 4 Dana, 251; Pence *v.* Duvall, 9 B. Mon. 48; — in Tennessee; Shaw *v.* Wilkins, 8 Humph. 647, 651, per *McKinney*, J.

(*b*) This is the rule adopted in Massachusetts; Gore *v.* Brazier, 3 Mass. 523; Bigelow *v.* Lorney, 4 Id. 512; Morton *v.* Babcock, 2 Metc. 510; White *v.* Whitney, 3 Id. 81, 89; — in Maine; Cushman *v.* Blanchard, 2 Greenl. 266, 268; Swett *v.* Patrick, 3 Fairf. 9; Hardy *v.* Nelson, 27 Maine, 525; Elder *v.* True, 32 Id. 109; — in Connecticut; Horsford *v.* Wright, Kirby, 3; Sterling *v.* Peet, 14 Conn. 245; — in Vermont; Drury *v.* Strong, D. Chip. 111; Park *v.* Bates, 12 Vt. 387. The question, although raised, is undecided in New Hampshire and Indiana. Loomis *v.* Bedel, 11 N. H. 74, 87; Blackwell *v.* Justices of Lawrence Co. 2 Blackf. 143, 147. See Rawle on Cov. for Title, pp. 319, *et seq.* (2d edition); 4 Kent. Comm. 474–480; 2 Greenl. Ev. § 264. In Louisiana the question has been much discussed and different rules have prevailed under the codes of 1808 and 1825. See Bissell *v.* Erwin, 13 Louis. 147; Edward *v.* Martin, 19 Id. 294; Morris *v.* Abat, 9 Id. 552; 13 Id. 148, *note*. The question was thoroughly discussed in the late case of Burrows *v.*

tion between the increased worth by a rise in the market value of the land, which has cost the grantee nothing, and that increase caused by his expenditure in affixing valuable buildings or other improvements to the land. And there are some reasons in favor of allowing to the grantee, as damages, the latter kind of increase, but not the former. (*c*) It has also been held, that the purchase-money, with interest, forms the absolute measure of the damages. (*d*) If the failure of title extend only to a part of the land, the question has been raised whether the damages should be recovered for the whole land, or for part only, and then whether the proportion which the *quantity* of the land lost by the failure bears to the whole, should be considered, or the proportion which its *value* bears; but the principle of compensation prevails, and it may be considered as established, that the part only of the land of which the title has failed, is to be paid for, (*e*)

Peirce, 6 La. Ann. 297, and it was held, *Rost*, J., dissenting, that the increased value at the time of eviction ought not to be recovered. The grantee is also entitled to recover the costs of the suit by which he has been evicted. Pitcher *v.* Livingston, 4 Johns. 1; Baxter *v.* Ryerss, 13 Barb. 267; Holmes *v.* Sinnickson, 3 Green. (N. J.) 313; Cushman *v.* Blanchard, 2 Greenl. 266; Swett *v.* Patrick, 3 Fairf. 9.

(*c*) Staats *v.* Ten Eyck, 3 Caines, 117; Pitcher *v.* Livingston, 4 Johns. 13, per *Spencer*, J.; Bender *v.* Fromberger, 4 Dall. 442; Martin *v.* Atkinson, 7 Geo. 228. See *ante*, p. 497, note (*p.*) But there seems to be no adjudication in favor of applying the distinction referred to in the text to this class of cases.

(*d*) In most of the cases cited *supra*, note (*a*), the consideration-money with interest and the costs were held to be the measure of damages, but in Shrelkeld *v.* Fitzhugh, 2 Leigh, 451, it was suggested that in some cases it might be shown that the actual value of the land was greater than the price paid. See 4 Kent's Com. 476.

(*e*) In Morris *v.* Phelps, 5 Johns. 49, the title to a part of the premises failed, and it was urged that the plaintiff ought to recover the whole consideration-money, but the court laid down the rule in the text. *Kent*, Ch. J., said: "This is an old and well-settled rule of damages; thus, in the case of Beauchamp *v.* Damory, Year Book, 29 Ed. III. 4, it was held, by *D'Hile*, J., that if one be bound to warranty, he warrants the entirety, but he shall not render in value but for that which was lost. In 13 Ed. IV. 3, (and which case is cited in Bustard's case, 9 Co. 60,) the same principle was admitted, and it was declared and agreed to by the court, that in exchange, where a want of title existed as to part, the party evicted might enter as for a condition broken, if he chose; but if he sued to recover in value, he should recover only according to the value of the part lost. Though the condition be entire, and extends to all, yet it was said that the warranty upon the exchange might severally extend to part. So in the case of Gray *v.* Briscoe, Noy's R. 142, B. covenanted that he was seized of Blackacre in fee, whereas in truth it was copyhold land in fee, according to the custom; and the court said that the jury should give damages according to the difference in value between fee simple land and copyhold land." See also Guthrie *v.* Puysley, 12 Johns. 126. In Johnson *v.* Nyce, 17 Ohio, 66, it was said that, in an action on a covenant of warranty broken by the assignment of dower, damages would be given to the extent that the value of the estate is diminished by carving out the life-estate, taking one third of the consideration-money to be the value of one third of the fee simple interest. See Rickert *v.*

and that in proportion to its value, and not its mere quantity. (*f*)

If the action is brought upon the covenant that the land is free from encumbrances, it will be necessary to consider the nature and effect of the encumbrances. If they consist of mortgages or attachments, or other liens of like kind, it seems to be well settled that the grantee may pay off these encumbrances, and may then recover all that he expended in this way, from the grantor; (*g*) and may even recover the amount of money paid by him to remove these encumbrances, after the action has been commenced. (*h*)

Snyder, 9 Wend. 416; Michael *v.* Mills, 17 Ohio, 601; Gray *v.* Briscoe, Noy, 172; Rawle, on Cover. for Title, 2d ed. p. 113 *et seq.*

(*f*) In Morrison *v.* Phelps, 5 Johns. 49, 56, *Kent*, Ch. J., in delivering the opinion of the court, said: "Another question in this case is, whether the defendant ought not to have been permitted to show that the lands, in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water with expensive improvements upon it, with ten acres of adjoining barren land, was sold for 10,000 dollars, and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages, under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated; and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of the extreme injustice, if he was obliged to refund nine tenths of the consideration-money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost, and the land preserved." See also Cornell *v.* Jackson, 3 Cush. 509; Dickens *v.* Shepherd, 3 Murph. 526. In King *v.* Pyle, 8 S. & R. 166, this rule was applied where the sale was fraudulent, but the court did not decide what would be the rule if the sale were *fair*. There are cases which hold that the average value is to be recovered for the part to which the title has failed. Nelson *v.* Mathews, 2 Hen. & Munf. 164; Nelson *v.* Carrington, 4 Munf. 332.

(*g*) Delavergne *v.* Norris, 7 Johns. 358; Hall *v.* Dean, 13 Id. 105; Stannard *v.* Eldridge, 16 Johns. 254; Prescott *v.* Trueman, 4 Mass. 627; Henderson *v.* Henderson, 14 Mis. 151.

(*h*) Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 Id. 474; Kelly *v.* Low, 18 Maine, 244; Pomeroy *v.* Burnett, 8 Blackf. 143; together with reasonable expenses incurred in extinguishing the encumbrance, exclusive of counsel fees. Leffingwell *v.* Elliott. But the grantee cannot recover beyond the amount of the consideration-money and interest. Dinnaick *v.* Lockwood, 10 Wend. 142; Foote *v.* Burnett, 10 Ohio, 317; 4 Kent's Com. 476. But in those States in which, in action for a breach of the covenant of warranty, the measure of damages is held to be the value of the estate at the time of eviction, it seems that the grantee may recover what he has paid to extinguish encumbrances, to the extent of the value of the estate at the time of payment. Norton *v.* Babcock, 2 Metc. 510; White *v.* Whitney, 3 Id. 81; Rawle on Cov. for Title, (2d edition,) 161; Sedgwick on Dam. 180. In Elder *v.* True, 32 Maine, 104, it was held that where land is encumbered by a mortgage, the grantee may redeem or not at his election, but, if evicted, he may recover the value of the land including his improvements, even if the value exceed the amount due on the mortgage. But see White *v.* Whitney, 3 Metc. 81; Donahoe *v.* Emery, 9 Metc. 63.

But, if he does not discharge the encumbrances, and brings his action before ouster or any actual injury springing from them, although the action is sustainable, because the existence of the encumbrances works a breach of the covenant, yet he can recover only nominal damages. (*i*) Still, if the encumbrances are of a permanent nature, such as interfere with the actual enjoyment of the estate, and such that the grantee cannot remove them by his own act, as for instance, a lease of the whole or a part of the premises, then it would seem that actual compensation may be recovered, and that there is no rule which should prevent this from being full and adequate. (*j*) If the action is brought on a contract to sell, and against the party who had promised to sell and had failed to do so, many authorities have held that the result may depend upon the cause of the failure. For if the intended vendor was honest, and was prevented from making the sale by causes which he did not foresee, and could not control, then the plaintiff recovers only nominal damages; or, if he has paid the price, that sum with interest, adding perhaps, in both cases, his expenses in investigating the title, or for similar purposes. (*k*) But if the proposed vendor was in

(*i*) Prescott *v.* Trueman, 4 Mass. 627; Wyman *v.* Ballard, 12 Id. 304; Tufts *v.* Adams, 8 Pick. 547; Herrick *v.* Moore, 19 Maine, 313; Delavergne *v.* Norris, 7 Johns. 358; Hall *v.* Dean, 13 Id. 105; Stanard *v.* Eldridge, 16 Id. 254; Whistler *v.* Hicks, 5 Blackf. 100; Davis *v.* Lyman, 6 Conn. 254. Payments for the discharge of encumbrances cannot be recovered unless specially alleged. De Forest *v.* Leete, 16 Johns. 122.

(*j*) Prescott *v.* Trueman, 4 Mass. 627, 630; Harlow *v.* Thomas, 15 Pick. 66, 69; Hubbard *v.* Norton, 10 Conn. 422, 435. In Batchelder *v.* Sturgis, 3 Cush. 205, *Fletcher*, J., in giving the opinion of the court, said: "In New York, in the case of Rickert *v.* Snyder, 9 Wend. 423, it was held, that when the covenant against encumbrances is broken, by reason of an unexpired term, which is the present case, the rule of damages is the annual value of the estate, or the annual interest on the purchase-money. This rule may do justice in some, perhaps in many cases, but this court is not prepared to adopt it as a general rule. . . . The rule is, that for such encumbrances as a covenantee cannot remove, he shall recover a just compensation for the real injury resulting from the encumbrance. Though it seems desirable to have as definite and precise rules, upon the subject of damages, as are practicable, it seems impossible to establish any more precise general rule in this class of cases." If the grantee is permanently kept out of the estate, by reason of the encumbrances, the purchase-money and interest are the measure of damages. Chapel *v.* Bull, 17 Mass. 213; Jenkins *v.* Hopkins, 8 Pick. 346; so also, in case of eviction, Waldo *v.* Long, 7 Johns. 173; Martin *v.* Atkinson, 7 Geo. 228; Patterson *v.* Stewart, 6 W. & S. 527. But see Chapel *v.* Bull; Jenkins *v.* Hopkins, and *supra*, p. 498, note (*t*). In an action on a covenant to pay off encumbrances, the amount of the encumbrances is held the measure of damages. Lethbridge *v.* Mytton, 2 B. & Ad. 772.

(*k*) Flureau *v.* Thornhill, 2 W. Bl. 1078; Walker *v.* Moore, 10 B. & C. 416; Worthington *v.* Worthington, 8

fault, and either did know, or should have known, that he could not do what he undertook to do, here substantial damages may be given, including compensation for any actual loss, as by the increased value of the land; (*l*) and this has

B. C. 134; Baldwin *v.* Munn, 2 Wend. 389; Peters *v.* McKeon, 4 Den. 546; Thompson *v.* Guthrie, 9 Leigh, 101; Combs *v.* Tarlton, 2 Dana, 464; Allen *v.* Anderson, 2 Bibb, 415; Stewart *v.* Noble, 1 Greene, (Iowa,) 26. See Fletcher *v.* Button, 6 Barb. 646. This rule appears to be established in England and generally prevails in this country; but there appears to be some diversity in the reasoning upon which it is based. In England the rule appears to be sustained on the ground that the parties must have contemplated the difficulties attendant upon the conveyance, and hence the plaintiff is allowed to recover the expense of investigating the title, but no other expenses, on the ground that he is not justified in taking any other step until he is sure of a good title. In Flureau *v.* Thornhill, *Blackstone*, J., said, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." In Walker *v.* Moore the land was not conveyed on account of a defect in the title. The plaintiff had contracted to resell, and demanded damages for the loss of profits on his contracts of resale, for the expense attending those resales, and for the amount for which he was liable to the subcontractors for examining the title, and the expense incurred by himself for the same purpose. He was allowed to recover only his own expense in examining the title. *Parke*, J., said, "It is usual and reasonable, before any expense is incurred, to compare the abstract with the deeds; and without giving any opinion as to the right of the plaintiff to resell before he had obtained a conveyance and actual possession, I think he cannot recover those expenses which he has sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not." *Bayley*, J., supposed he might have recovered the expense attending the resale, had that contract been entered into after proper investigation. He said, "If it [the abstract] had been examined with the deeds and found correct, the plaintiff might perhaps have been justified in acting upon the faith of having the estate; and if after that time he had made a subcontract, I think he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor." The plaintiff, having failed in a bill in equity brought to enforce specific performance of a contract to sell land, because the defendant could not give title, was not allowed to recover his costs in the equity suit, in an action at law. Malden *v.* Tyson, 11 Q. B. 293. In this country, although nearly the same rule is in some of the States adopted, (differing perhaps from the English in the fact that the expense of investigating the title is not allowed,) it is based upon the analogy between this class of cases and actions upon covenants for title. As we have seen, in those cases, the measure of damages where there has been an eviction, is in most of the States, the amount of the consideration-money, with interest; so in actions upon this class of contracts the same rule has been adopted. In Baldwin *v.* Munn, *Sutherland*, J., said: "In an action on the covenant against encumbrances in a deed, the plaintiff can recover only the amount paid by him to extinguish the encumbrance; but if he has paid nothing, no matter what the amount of the lien may be, he can recover *nominal damages only*. Delavergne *v.* Norris, 7 Johns. 358; 4 Mass. 627; 13 Johns. 105. If these principles are just, in relation to the covenant of general warranty, and of quiet enjoyment, and against encumbrances, I do not perceive why they are not equally applicable to the covenant to convey, where the covenantor has acted in good faith, and refuses to convey because his title has in fact failed. The reasons which are urged with so much force, by Ch. J. *Kent*, in Staats *v.* Ten Eyck, (3 Caines, 111, 115,) in favor of the rule of damages adopted in that case, certainly apply with equal force to the case in question." See the other American cases cited above.

(*l*) See authorities cited in the preceding note, and Bitner *v.* Brough, 11 Penn. St. 127; Handley *v.* Chambers,

been extended to cases where the vendor acted in good faith, but knew that he had, at the time, no title; as where the vendor offered for sale at public auction, land which he had contracted with a third person to buy from him, and failed to buy, only on account of the inability of that third person to make a conveyance to him. (*m*) In this respect the rule would be distinguished from that applicable to actions for non-sale of chattels, where the plaintiff recovers compensation for all actual damages, without any reference to the good or bad faith of the vendor. But the Supreme Court of the United States have refused to adopt this distinction, on the ground that the reason of the rule as to chattels applies with equal force to bargains respecting land; this reason being, that if a vendor, under such circumstances, could escape with nominal damages, there would be danger that he might refuse to complete the sale for the purpose of retaining to himself the enhanced value. (*n*) If on such a contract the

1 Litt. 358; Blanchard *v.* Ely, 21 Wend. 346, 347, per *Cowen*, J.; Nourse *v.* Barns, 1 T. Ray. 77. So where the party having title refuses to convey it; Driggs *v.* Dwight, 17 Wend. 71; Baldwin *v.* Munn, 2 Id. 399, 406; or having title at the time of the agreement, afterwards disables himself from completing it, by selling the land to a third party; Patrick *v.* McConnel, 2 Bibb, 47; Fisher *v.* Kay, 2 Id. 434, 440; Wilson *v.* Spencer, 11 Leigh, 261; or at the time of the agreement knew he had no title; McConnell *v.* Dunlap, Hardin, 41.

(*m*) Hopkins *v.* Grazebrook, 6 B. & C. 31. See this case cited in Walker *v.* Moore, 10 B. & C. 416, and in Fletcher *v.* Button, 6 Barb. 650. The doctrine of Hopkins *v.* Grazebrook, was affirmed in Robinson *v.* Harman, 1 Exch. 850. *Parke*, B., said: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of Flureau *v.* Thornhill qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook*. So it has been held in this country that, where the agreement is that a third person shall convey land, the measure of damages is the value of the land at the time when it should have been conveyed. Dyer *v.* Dorsey, 1 G. & J. 440; Pinkston *v.* Hine, 9 Ala. 252. But see Tyrer *v.* King, 2 C. & K. 149.

(*n*) Hopkins *v.* Lee, 6 Wheat. 109. See also Cannell *v.* M'Clean, 6 H. & J. 297; Nichols *v.* Freeman, 11 Ired. 99; Bryant *v.* Hambruck, 9 Geo. 133; Whiteside *v.* Jennings, 19 Ala. 784; Hill *v.* Hobart, 16 Maine, 164; Warren *v.* Wheeler, 21 Id. 484. In some of these cases the doctrine of those American cases, cited *supra*, note (*k*), that actions on a covenant to convey, are so far analogous to those upon covenants for title, that the damages should be measured by the same rule, is rejected. In Nichols *v.* Freeman, the defendant was prevented from giving a good title by a levy of execution upon the land, and

proposed vendee is sued, if he has taken the land, the measure of damages is, of course, the price with interest; if he has neither taken the land nor paid the price, in England the plaintiff receives only nominal damages, unless the land has fallen in value, or he has otherwise suffered actual injury, on the ground that if he recovered the full price, he would have that and the land too; because the recovery cannot have the effect of passing the fee of the land. (*o*) In this country, some cases have thrown doubt on this rule, but upon the whole we think it pretty well established. (*p*)

there appears to have been no fraud on his part. The value of the land at the time of the breach was regarded as the measure of damages. *Pearson*, J., said: "Our attention has been called to the fact, that in the action for a breach of a covenant of quiet enjoyment, the measure of damage is, the price paid for the land, which is taken, as between the parties, to be the true value. . . The analogy does not sustain the position for which it was invoked; because the rule of damage in that action is founded on peculiar reasons. The covenant for quiet enjoyment is a substitute for the old *real warranty*, the remedy upon which was by voucher, and if the demandant recovered, the tenant had judgment against the voucher for other lands of equal value." See also the very able decision of *Buchanan*, Ch. J., in Cannell *v.* M'Clean. And even in New York some doubt seems to have been thrown upon the rule laid down in Baldwin *v.* Munn, cited *supra*, note (*k*), in the late case of Fletcher *v.* Button, 6 Barb. 646; where, under a verbal contract, land is to be conveyed in consideration of a specific sum payable in work, the vendee who has performed the work, may consider the agreement as a nullity and recover the value of his work, not exceeding the sum specified, with interest; and he can only resort to evidence of the value of the land as a measure of damages, when no sum is specified. King *v.* Brown, 2 Hill, 485; Burlingame *v.* Burlingame, 7 Cow. 92; Rohr *v.* Kindt, 3 W. & S. 563; Jack *v.* McKee, 9 Penn. St. 235; Bash *v.* Bash, 9 Id. 261. See Boardman *v.* Keeler, 21 Vt. 84.

(*o*) In Hawkins *v.* Keep, 3 East, 410; in Goodisson *v.* Nunn, 4 T. R. 761, and in Glasebrook *v.* Woodrow, 8 Id. 366, it seems to have been assumed that the vendor, on tender of a conveyance, could recover the amount of the purchase-money. But in the late case of Laird *v.* Pim, 7 M. & W. 474, where the vendor had offered to execute a conveyance, and was "in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him," it was said by *Parke*, B., in delivering the opinion of the court: "The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendant's not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract. It is clear that he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again."

(*p*) In Franchot *v.* Leach, 5 Cowen, 506, the jury, under direction of the judge, found the consideration-money and interest as damages for the vendee's breach of his contract, and no objection seems to have been made to the direction. In Alna *v.* Plummel, 4 Greenl. 258, the defendant having bought a pew at auction, and refused a deed when tendered to him, it was held that the measure of damages was, "the price agreed to be paid for the pew by the defendant, who will be entitled to the deed whenever he chooses to accept it." This doctrine was approved in Shannon *v.* Comstock, 21 Wend. 457, 460, and in Williams *v.* Field, cited in Sedgwick on Damages,

If the contract be to give land for work and labor, this may be treated as for so much money in work and labor.

If the action be brought on the usual covenants in leases, the rule is, as before, compensation. Hence a tenant for life of an estate leased by him, can recover only such damages for breach of covenant by the lessee, as are proportionate to the injury done to the life-estate. (*q*) And the action may be brought on the covenant to repair, before the end of the term, because, although a tenant has, in one sense, the whole term in which to repair, yet the covenant to repair is broken as soon as repairs ought to be made, and are not made. (*r*) By parity of reasoning the same action might be brought against a landlord, when he, in the same way, failed to discharge his obligations.

A covenant to repair, or to keep the premises in good and sufficient repair, does not mean, only, that they must be kept in the same repair in which they were when the tenant took them, for this may not be good repair; but, it has been held that the jury might properly take into consideration the condition of the premises at the commencement of the lease, in order to ascertain what was meant by the words, repair, or good repair, as used in that lease. (*s*)

p. 192, and appears to be now well settled in Maine; Oatman *v.* Walker, 33 Maine, 67. But see Sawyer *v.* McIntyre, 18 Verm. 27.

(*q*) Hence a tenant for life of an estate leased, can only recover such damages for breach of covenant by the lessee, as are commensurate with the injury done to the life-estate. Evelyn *v.* Raddish, Holt, 543; McKeen *v.* Gammon, 33 Maine, 187, 192. In New York the same rule of damages is applied in actions on covenants for quiet enjoyment in leases as in conveyances of the fee simple. The lessee is allowed costs incurred in defending his title and the rents he has paid during the time he is liable for mesne profits to the true owner, with interest thereon; but he can recover nothing for improvements, or the increased value of the premises. Kinney *v.* Watts, 14 Wend. 38; Moak *v.* Johnson, 1 Hill, 99; Kelly *v.* Dutch Church of Schenectedy, 2 Hill, 105, 115. See Lewis *v.* Campbell, 8 Taunt. 715; 3 B. & Ald. 392. If a lease contains a covenant by a tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire; if they are burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter. Digby *v.* Atkinson, 4 Camp. 275. In Dewint *v.* Wilste, 9 Wend. 325, "where a party took a lease of a ferry, and covenanted to maintain and keep the same in good order, and instead of so doing, diverted travellers from the usual landing to another landing owned by himself, by means whereof a tavern-stand belonging to the plaintiff, situate on the first landing, was so reduced in business as to become tenantless, it was held, in an action by the landlord for breach of the covenant, that he might assign, and was entitled to recover as damages the loss of rent of the tavern-stand."

(*r*) Luxmore *v.* Robson, 1 B. & Ald. 584; Scheiffeln *v.* Carpenter, 15 Wend. 400.

(*s*) Burdett *v.* Withers, 2 N. & P.

123; Stanley *v.* Towgood, 3 Bing. N. C. 41. See Harris *v.* Jones, 1 M. & R. 173; Gutteridge *v.* Munnyard, 7 C. & P. 129. In Thompson *v.* Shattuck, 2 Mete. 615, the defendant had covenanted to keep one half of a mill-dam in repair, but the plaintiff's assignor was bound to repair the other half. The defendant failed to make seasonable repairs, the plaintiff repaired the whole, and claimed as damages one half the expense of repairs and the loss of profits in the mill on account of delay. He recovered the former, but not the latter. *Dewey, J.*, in delivering the opinion of the court, thus stated the grounds of the decision. "It being the duty of Plumb [the plaintiff's assignor] to make one half of the repairs, and it being a right which he might at once exercise, to proceed to make the whole repairs, after neglect and refusal of the defendant, upon reasonable notice to aid in the repairs; if said Plumb delayed to exercise that right and thereby sustained a loss, it is one which he alone must bear." See Green *v.* Mann, 11 Illinois, 613. In Green *v.* Eales, 2 Q. B. 225, it was held that a lessor who has covenanted to repair the demised premises, is not liable to the lessee for the rents he was obliged to pay for another residence, or for expense in fitting it up, while the repairs were going on, although the lessee was obliged to move out for repairs in consequence of the lessor's neglect.

CHAPTER VIII.

THE CONSTITUTION OF THE UNITED STATES.

Sect. 1. — *What are Contracts, within the clause respecting the obligation of them?*

In the tenth section of the first article of the Constitution of the United States, it is provided that "no State shall . . pass any . . law impairing the obligation of contracts." (*t*) Under this clause two questions of great importance have been agitated. One is, what is a contract within the meaning of this section? (*u*) The second is, what operation upon or interference with a contract, is to be considered as impairing the obligation thereof? Neither question has received a positive and universal answer, settling by definition all the subordinate questions which may arise under it. But we have authoritative and constructive adjudication upon both.

It seems to be settled conclusively, that a grant is a contract; executed, it is true, but still a contract; and that it comes within the scope of this provision; (*v*) and therefore

(*t*) This clause does not apply to laws enacted by the States before the first Wednesday of March, 1789—the day when the constitution of the United States went into operation. Owings *v.* Speed, 5 Wheat. 420. Nor does it affect the powers of Congress. Evans *v.* Eaton, 1 Peters, S. C. 322.

(*u*) "The provision of the constitution never has been understood to embrace other contracts than those which respect *property, or some object of value*, and confer rights which may be asserted in a court of justice." Dartmouth College *v.* Woodward, 4 Wheat. 518; per *Marshal*, C. J., 629.

(*v*) Therefore the grant of lands by the legislature of a State, constitutionally empowered to make it, cannot be revoked by its successor. See Fletcher *v.* Peck, 6 Cranch, 87, 136. *Marshall*, C. J.: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says *Blackstone*, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which

if there be a grant, in itself valid, any law which is, or permits, a direct interference with the enjoyment of the things granted, or a diminution of their value, or any deprivation of the things granted, or of the rights or interests belonging to them, by the grantor, impairs the obligation of the contract. (*w*)

This must be true, in general; but it must also be subject to some important qualifications. For the exercise of the ordinary powers of government, which it could not have been intended to take away or control by this provision, may often have the effect of diminishing the value of things previously granted. Thus, if a State sold a piece of land for two dollars an acre, and soon after sold similar and adjoining land, differing in no respect from the first, for one dollar an acre, and announced this as its price, the market value of the lands first sold would fall, perhaps, one half; yet no one could doubt that the State had a right to make this second sale. But it is easy to proceed from this question, to which

still continues; and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of this provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each State." Dartmouth College *v.* Woodward, 4 Wheat, 656, per *Washington*, J.; Rehoboth *v.* Hunt, 1 Pick. 224; Lowry *v.* Francis, 2 Yerg. 534; Butler *v.* Chariton County Court, 13 Miss. 112. So where the grant is to a corporation the State cannot revoke it; Tenet *v.* Taylor, 9 Cranch, 43; Wilkinson *v.* Leland, 2 Peters, 657. See Den d. University of North Carolina *v.* Foy, 1 Murph. 58.

(*w*) Winter *v.* Jones, 10 Geo. 190; Planter's Bank *v.* Sharp, 6 How. 301, 327.

the answer is obvious, to others in which it is more difficult. And all we can say, on authority, upon the general question, what limits this necessity of leaving unimpaired all the functions of government, and the control by the public of all public interests, imposes upon the operation of the clause under consideration, would seem to be this: We may say, that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a State may at any time deem expedient. (*x*) This rule seems to spring from an obvious necessity; but it rests also upon an obvious and sufficient reason. This is, that in relation to public property, there is no grant; no contract whatever, executed or executory. By such an act, the public, by the legislature, which is its agent, gives something of its own, to somebody else who is also its agent. Nothing then, in fact, is given; for nothing goes forth from the public. The whole transaction amounts to no more than a change made by the public, in the manner in which, or the agents by whom, it shall continue to hold and use a certain portion of its property or interests. The very essence of a contract — *two* parties, with mutual obligations — is wanting; and it is therefore no contract at all. Therefore all political powers conferred by the legislature on a municipal corporation may be revoked. (*y*) But, on the other hand, if private property or franchises are granted to a municipal corporation, this grant cannot be revoked, nor the property or rights conferred by it in any way devested by the State. (*z*) Nevertheless, the State does not lose its right of making laws concerning the things granted, so far as they

(*x*) Dartmouth College *v.* Woodward, 4 Wheat. 518, 629. *Marshal*, C. J.: "That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." Philips *v.* Bury, 2 T. R. 352; Knoop *v.* The Piqua Bank, 1 Ohio State R. 603, 609; Toledo Bank *v.* Bond, 1 Ohio State R. 657, per *Bartley*, C. J.

(*y*) The People *v.* Morris, 13 Wend. 325; Marietta *v.* Fearing, 4 Ohio, 427; Tenett *v.* Taylor, 9 Cranch, 43; Bradford *v.* Cary, 5 Greenl. 339, 342; Bush *v.* Shipman, 4 Scam. 186; Trustees of Schools *v.* Tatman, 13 Ill. 27; Mills *v.* Williams, 11 Iredell, 558.

(*z*) Tenett *v.* Taylor, *supra*; Town of Pawlet *v.* Clark, 9 Cranch, 292; Dartmouth College *v.* Woodward, 4 Wheat. 518; Bailey *v.* The Mayor of New York, 3 Hill, 531.

remain *publici juris*, or so far as it sees fit to provide for the due exercise of the rights granted, or the proper use of the property granted, for the public benefit and safety. (*a*) So the salary and tenure of an office prescribed by law, do not constitute a contract which is protected by this clause in the constitution; and they may therefore be modified or reduced, unless this is prohibited by the constitution of the State.(*b*)

(*a*) In Benson *v.* The Mayor, &c. of New York, 10 Barb. 223, it was held that ferry franchises may be held by a municipal corporation, without losing their character as private property, and when accepted and acted upon they cannot be resumed by the State; but that the State is not excluded from legislation touching them, so far as they are *publici juris*, and may pass laws to secure the safety of passengers and protect them from imposition, &c. In East Hartford *v.* Hartford Bridge Co. 10 How. 511; S. C. 17 Conn. 79, the reasoning of *Woodbury*, J., delivering the opinion of the court, indicates the opinion that ferry franchises, when granted to municipal corporations, are public privileges, in the nature rather of public laws, than of contracts to be modified or abolished by the legislature, as the public interests demand; but the circumstances of the case did not call for the opinion, as in that case the ferry right was in express terms to be held during the pleasure of the General Assembly.

(*b*) Warner *v.* The People, 2 Denio, 272; Conner *v.* The City of New York, 2 Sandf. 355; S. C. 1 Selden, 285; Knoop *v.* The Piqua Bank, 1 Ohio State R. 616, per *Corwin*, J.; Toledo Bank *v.* Bond, Id. 656; Commonwealth *v.* Bacon, 6 S. & R. 322; Commonwealth *v.* Mann, 5 W. & S. 418; Barker *v.* Pittsburgh, 4 Barr, 51; The West River Bridge Co. *v.* Dix, 6 How. 548; Butler *v.* Pennsylvania, 10 Id. 402. In 1836, the State of Pennsylvania passed a law directing canal commissioners to be appointed annually by the governor, and that their term of office should commence on the first of February in every year. The pay was fixed by the law at four dollars *per diem*. In April, 1843, certain persons being then in office as commissioners, the legislature passed another law, providing, amongst other things that the *per diem* should be only three dollars; the reduction to take effect upon the passage of the law; and that in the following October, commissioners should be elected by the people. The commissioners claimed the full allowance, during the entire year, upon the ground that the State had no right to pass a law impairing the obligation of a contract. It was held that there was no contract between the State and the commissioners, within the meaning of the constitution of the United States. *Daniels*, J.: "The contracts designed to be protected by the 10th section of the first article of that instrument, are contracts by which *perfect rights*, *certain definite*, *fixed*, *private rights* of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government, for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense.

The reason for the difference, as to the operation of this section, upon public and upon private property, will also help us to answer the next question: What is private property, in this sense and for this purpose? The answer is, any thing and every thing which has gone *out of* the public, by its grant or its sanction. To determine any particular case, therefore, we should take the instrument referring to the property, whether it be a statute or any thing else, and ask whether, if read rationally and honestly, it leaves the usufruct of the property and interests substantially in the possession, or the management thereof within the control of the public, by such agents as it may appoint, or not. If it does, then it is public property, and this clause does not attach; if it does not, then it is private property, and this clause does attach.

Thus, it has been very solemnly and we hope authoritatively decided, that a corporation is a person who may take a grant as well as any individual; that a corporation, erected by the legislature or adopted by the legislature, and endowed with certain powers, and functions, and property, the legislature reserving no interest in what is given them, and no control over the succession of persons who form the corporation, or over the exercise of their functions, — such a corporation is a private corporation, to whom a franchise has been given, by a grant, which is an executed contract, and that any deprivation of their property, or any disturbance or denial of their rights and functions, impairs the obligation of the contract. And if the legislature have reserved to themselves

The establishment of such a principle would arrest necessarily every thing like progress or improvement in government; or if such changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a State, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community." See Allen *v.* McKean, 1 Sumn. 277. See also, in Whillington *v.* Polk, 1 Har. & J. 236; a strange case in which Luther Martin brought an action on an *assize sur novel disseisin*, to maintain the right of a judge to his seat, after the court had been destroyed by a statute repealing that under which the judge was appointed.

rights in the creation of such corporation, or in any grant to them, these reservations are to be strictly followed; whatever lies without them, being as if there were no reservations whatever. (*c*)

That the charters of private civil corporations, — of which banks, or insurance, turnpike, and railroad companies are leading instances, — are contracts, protected by this clause in the constitution of the United States, seems to be well settled. (*d*) But any charter may contain within it an ex-

(*c*) Dartmouth College *v.* Woodward, 4 Wheat. 518. The law of this case is, that an eleemosynary corporation, founded by private contributions for the distribution of a general charity, is not an instrument of government whose officers are public officers, but a private corporation whose charter is a contract between the donors, the trustees, and the government, founded on the consideration of public benefit to be derived from the corporation, which cannot be altered, amended, or modified by the State, without the consent of the corporation. It also decides that the charters, granted by the crown before the Revolution, are within this principle, except so far as they were affected by the legislation of parliament or of the colonies, before the adoption of the U. S. Constitution; and the doctrine that civil rights were not destroyed by the Revolution is well established. Dawson *v.* Godfrey, 4 Cranch. 323; Tenett *v.* Taylor, 9 Id. 43; Society, &c. *v.* New Haven, 8 Wheat. 464; The case of Dartmouth College *v.* Woodward has been often affirmed, both in the State and Federal Courts, and cited as an unquestionable authority. Society, &c. *v.* New Haven, 8 Wheat, 464; Trustees of Vincennes University *v.* Indiana, 14 How. 268; Norris *v.* The Trustees of Abingdon Academy, 7 G. & J. 7; Grammar School *v.* Burt, 11 Vt. 632; Brown *v.* Hummell, 6 Barr, 86; The State *v.* Heywood, 3 Rich. 389. It is insisted, in Toledo Bank *v.* Bond, 1 Ohio State R. 670–679, that the case of Dartmouth College *v.* Woodward did not decide the *franchise* or *charter* of a corporation to be a *contract*, but only that the *circumstances of the case* constituted a *contract* between the donors and the corporators, for the conveyance and perpetual application of private property, for the purposes of the trust under the charter, and that this contract was impaired by the State laws, which did not merely interfere with the charter, but also transfered the private property held by the trustees to another corporation, in violation of the terms of the contract by which the trust had been created and the property invested.

(*d*) Thus if a bank has by its charter an express or implied power to sell and transfer negotiable paper, a law taking away this power impairs the obligation of a contract, and is void. Planters Bank *v.* Sharp, 6 How. 301; The People *v.* Manhattan Co. 9 Wend. 351. See also Providence Bank *v.* Billings, 4 Peters, 560; Turnpike Co. *v.* Phillips, 2 Penn. 184; Claghorn *v.* Cullen, 13 Penn. St. 133; Com. Bank of Natchez *v.* The State of Mississippi, 6 S. & M. 599; Backus *v.* Lebanon, 11 N. H. 19; Michigan State Bank *v.* Hastings, 1 Doug. 225; Miners Bank *v.* United States, 1 Greene, 553; Bank of the State *v.* Bank of Cape Fear, 13 Iredell, 75. It has recently been held in Ohio, that a charter is a legislative enactment, subject to amendment or repeal, possessing the form and essential elements of a law, and not those of a contract, and that an incorporated banking institution is a public corporation appointed for public purposes, subject to the control of the public, the charter of which is held at the pleasure of the sovereign power. Mechanics & Traders Bank *v.* Debolt, 1 Ohio State R. 591; Toledo Bank *v.* Bond, Id. 622; Knoop *v.* The Piqua Bank, Id. 603, 609. Per *Corwin*, J.: "I maintain that a banking institution is a *public* institution, appointed for public purposes; never legitimately created for private purposes, its creation proceeding solely upon the idea of public necessity or public convenience, and that, being appointed by the public, solely for public uses, all its operations are subject to the

press reservation to all future legislatures, of repeal or modification; and this right may be secured by a general statute relating to a certain class of corporations. (*e*)

SECTION II.

WHAT RIGHTS ARE IMPLIED BY A GRANT.

It is an important question, what are the rights or interests which are, *by implication*, a part of an expressed grant, so that interference with them is prohibited by this clause. One answer would be, that every grant must be construed with absolute strictness; and nothing whatever be added, by implication or construction, to that which is expressly given. Another, that every thing which is requisite for the full enjoyment and most beneficial use of the thing granted, must be supposed to be given with the grant, or be contained in it; for it shall be construed strictly against the grantor, and the grantee has a right to the enjoyment, in fact, of the whole benefit of all that was given. But the true rule would permit some extension of the grant by implication, or rather

control of that public, who may, from time to time, as the public good may require, enlarge, restrain, limit, modify its powers and duties, and, at pleasure, dispense with its benefits. The agency, during its continuance, is equally independent, within its sphere, and upon a modification of its terms unsuited to its pleasure, the agency itself may be renounced and surrendered. So the rights of the agent to the profits and emoluments of the agency, as they may, from time to time, be prescribed, will be sacredly regarded and enforced by the courts of justice; but like every other agency, it is revocable at the will of the principal." A doctrine not wholly unlike this, is implied, or indeed asserted, in Butler *v.* Palmer, 1 Hill's N. York R. 324. There, an act passed May 12, 1837, gave the assignee of a mortgagor one year to redeem after a sale. An act passed April 18, 1838, repealed the former act, the repeal to take effect after Nov. 1, 1838. An assignee of a mortgagor, on Nov. 3, but within one year from the sale to him, offered to redeem. But it was held that he was barred by the repeal of the first act.

(*e*) No reservations but those expressed in the charter can be introduced by the legislature, without the consent of the corporation. Washington Bridge Co. *v.* The State, 18 Conn. 53. In Massachusetts there are statutes as to banking corporations, others as to manufacturing corporations, and others as to other corporations, which would certainly operate upon any particular charter, as if a part of it. In Stanley *v.* Stanley, 26 Maine, 191, it was held that a statute making the stockholders liable for the debts of the corporation, was valid in respect to debts subsequently contracted, and was binding on one who became a member of the corporation after the passage of the act. In Williams *v.* Planters Bank, 12 Robinson, Louis. R. 125, and Payne *v.* Baldwin, 3 Sm. & M. 661, it is held that banks may be required to receive their own bank-notes in payment of debts due to them, although under par in the market.

would construe it to include beside all that is expressly given, whatever else is strictly necessary to any beneficial use of the thing given, and would stop there. It would not be satisfied with a merely literal fulfilment of the contract, if this was in fact no actual discharge of it whatever, but a mere evasion of its provisions. But if the literal construction gave some beneficial use of the property or franchise, the grantor would not be held to have bound himself by implication, from such farther action as might prevent this use from being beneficial to the extent which might otherwise have been attained, and was originally expected. (*f*)

It is this view which the courts seem to have adopted. And the difficulties, or even errors, in fact, which may attend the application of such a rule to the circumstances of various cases, are not sufficient to justify a denial of the principle itself, which seems to be rational and just. For if the grantee wished to secure to himself all possible, or even probable and natural advantages, it was his business to ask for them. And if he did not, it was his neglect, or else he forebore to ask lest he should be denied, preferring to rest upon construction; and this conduct would certainly be entitled to no favor. And it is therefore not too much to say, that a legislative grant shall not be held to *intend* exclusive privileges, as appurtenant to a franchise expressly given. (*g*)

(*f*) United States *v.* Arendendo, 6 Peters, 736; Beatty *v.* Knowles, 4 Id. 152; Providence Bank *v.* Billings, 9 Id. 514; Jackson *v.* Lamphire, 3 Id. 289; Charles River Bridge *v.* Warren Bridge, 11 Peters, 548. *Taney*, C. J.: "The continued existence of a government would be of no great value if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court (referring to Providence Bank *v.* Billings) was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same." The Richmond R. R. Co. *v.* The Louisa. R. R. Co. 13 How. 81. Per *Grier*, J.: "It is a settled rule of construction adopted by this court that public grants are to be construed strictly. This act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this — that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public; and the corporation can claim nothing but what is clearly given by the act."

(*g*) Charles River Bridge *v.* Warren

SECTION III.

OF AN EXPRESS GRANT OF EXCLUSIVE PRIVILEGES.

We thus reach another question. If these exclusive privileges are expressly given, how does this clause of the constitution operate on them? If it makes them irrevocable, and

Bridge, 11 Peters, 420; S. C. 6 Pick. 377; 7 Pick. 345. In this, the leading case on this topic of constitutional law, the legislature of Massachusetts, in 1785, granted a charter to a company for the building of a bridge over Charles River, from Boston to Charlestown, under the name of the Charles River Bridge, and taking tolls of persons passing over it, for the term of forty years, extended by a subsequent act to seventy years. In 1828, before the expiration of the charter, an act was passed authorizing the erection of the Warren Bridge a few rods from the former, which was to become free in six years. The tolls of the Charles River Bridge were thereby reduced to a very small amount. It was held that the grant of franchises by the public, in matters where the public interests are concerned, as exemption from taxation and the right of the State to open new roads and construct new bridges, are to be construed strictly; that nothing passes by implication, and no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, convey; and that as the charter, in its terms, granted no exclusive rights above and below the bridge, and contained no stipulation, on the part of the State, not to authorize another bridge above or below it, no such exclusive right of the plaintiff company could be implied. *Taney*, C. J.: "It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising — continually advancing in numbers and wealth — new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations." pp. 547, 548. *Story*, J., in a dissenting opinion of great length, maintained that the grant to the Charles River Bridge should receive a liberal instead of a strict construction, and that there was necessarily implied in the charter of that company a stipulation that the legislature would charter no other bridge between Charlestown and Boston so near as to injure the former's franchise or diminish its toll, in a positive and essential degree. "To sum up, then," said he, "the whole argument on this head, I maintain, that upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication that the legislature should do no act to destroy or essentially to impair the franchise; that

forever forbids any repeal or withdrawal of them, or any interference with or modification of them, does it not deprive the legislature of giving them, on the ground that they are the agents of the public only for the present, and not for the future; and have no authority, expressly given, or implied from their function and duty as a legislature, to deprive the public of a future exercise of the power which the legislature now abandons? Thus, to put the question in the simplest form: If a State sells a square mile of land, expressly covenanting by its authorized deed, and expressly enacting by a confirmatory statute, that the land shall forever be exempt

(as one of the learned judges of the State court expressed it,) there is an implied agreement of the State to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. In other words, the State, impliedly, contracts not to resume its grant, or to do any act to the prejudice or destruction of its grant. I maintain that there is no authority or principle established in relation to the construction of crown grants, or legislative grants, which does not concede and justify this doctrine. Where the thing is given, the incidents without which it cannot be enjoyed, are also given; *ut res magis valeat quam pereat.* I maintain that a different doctrine is utterly repugnant to all the principles of the common law, applicable to all franchises of a like nature; and that we must overturn some of the best securities of the rights of property, before it can be established. I maintain that the common law is the birthright of every citizen of Massachusetts, and that he holds the title-deeds of his property, corporeal and incorporeal, under it. I maintain that under the principles of the common law, there exists no more right in the legislature of Massachusetts, to erect the Warren Bridge, to the ruin of the franchise of the Charles River Bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the legislature does not mean in its grant to give any exclusive rights, let it say so, expressly; directly; and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion, and zeal." pp. 647, 648. In the State court, 7 Pick. 344, the judges were equally divided on the question whether the Charles River Bridge had any exclusive rights beyond its own limits. *Morton*, J., (pp. 461, 464,) and *Wilde*, J., (pp. 468, 469,) holding against such a right, and *Putnam*, J., (p. 477,) and *Parker*, C. J., (p. 506,) in favor of such exclusive right beyond its limits. The doctrine of the case of Charles River Bridge *v.* Warren Bridge has been repeatedly confirmed. The West River Bridge *v.* Dix, 6 How. 532; S. C. 16 Vt. 446; The Mohawk Bridge *v.* The Utica and Schenectady R. R. Co. 6 Paige, 547; The Oswego Falls Bridge *v.* Fish, 1 Barb. Ch. 547; Thompson *v.* The New York & Harlem R. R. Co. 3 Sandf. Ch. 625; Tuckahoe Canal Co. *v.* Tuckahoe R. R. Co. 11 Leigh, 42; Washington & Baltimore Turnpike Co. *v.* Baltimore & Ohio R. R. Co. 10 G. & J. 392; Harrison *v.* Young, 9 Geo. 359; McLeod *v.* Burroughs, Id. 213; Shorter *v.* Smith, Id. 517; White River Turnpike Co. *v.* Vt. Central R. R. Co. 21 Vt. 590; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 41, 454; Miners Bank *v.* United States, 1 Greene, 553; Greenl. Cruise, tit. XXVII. § 29. Of the Charles River Bridge case it is said by *Barculo*, J., that, "to say the least of it, it stands upon the extreme verge of the law, and perhaps, reaches a little beyond justice and good faith." Benson *v.* The Mayor, &c. of New York, 10 Barb. 243. Where the right to build a bridge is given, it is exclusive within its own limits. Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

from taxation, is this covenant binding upon the State; that is, upon future legislatures? (*h*)

An answer to this question would require some consideration of the nature and extent of the rights of supreme sovereignty, and especially of eminent domain; and of the authority of the legislature in relation to them. Undoubtedly the feudal system forms no part of, and no foundation for, our system of legislation, in one sense; but in another, it is true that some of its important principles remain, as valid with us at this moment as ever anywhere. One of these is, that all property is held from the sovereign. We hold that the theory of our law goes even further on this point than the feudal system, because it extends this principle to personal as well as real property. And upon this principle rests the law of eminent domain; for *dominium*, from which this phrase comes, bears, as its legal sense, property, and not power. We think that every thing, whatever, that a citizen of this country owns, he holds in the same way as if he could trace his title back to an original grant from the sovereign; and this grant contained an expressed reservation of a right by the public or the State, which is the sovereign, to resume the property or any part of it, whenever it shall be wanted for the use of the sovereign; payment or compensation being made, or adequately provided for by law, for all that is thus resumed. And this is what we understand to be in this country, the law, or the right, of eminent domain. (*i*)

(*h*) See next note. In Richmond R. R. Co. *v.* The Louisa R. R. Co. 13 How. 71, *Curtis*, J., maintained that the State may grant an exclusive right to a railroad within certain limits, and pledge itself not to allow another to be constructed within these limits. See Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35, per *Parker*, C. J.

(*i*) Beckman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 72, 73; The West River Bridge Co. *v.* Dix, 6 How. 532, 533. *Daniel*, J.: "Under every established government, the tenure of property is derived, mediately or immediately, from the sovereign power of the political body, organized in such mode or exerted in such a way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of the tenure, that appeals can be made to the laws, either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration, or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individu-

This is then a right reserved and possessed by the public, and a right which extends over all property. And one question is, whether the people themselves can give away this right, or grant property without this reservation. To this it might be answered that the people, by their constitutions, bind themselves to act only constitutionally, and that no way is provided for such transfer or relinquishment. But, with-

als, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty." That the right of eminent domain is sometimes founded on sovereignty, public necessity, or implied compact, see Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 61; West River Bridge Co. *v.* Dix, 6 How. 539. Per *Woodbury*, J.

out now denying that the public might, by some sufficient act, divest themselves of the right of eminent domain, we proceed to the next question, which is, what is the power and authority delegated to the legislature over or in regard to this right of eminent domain?

We have no doubt whatever, that the true answer to this question is, that the legislature derives, in part from the language common to all our constitutions, in part from implications from their expressions, and in part from the very nature of their functions, full authority to exercise an unlimited power as to the management, employment and use of the eminent domain of the State, and to make all the provisions consequent upon, or necessary to the exercise of this right or power, but no authority whatever to give this away, or take it out of the people directly or indirectly. Assuming this to be a true principle, let us see how it applies. Let it be certain that the legislature can give to any parties the right to build a bridge over any stream, and between any termini; and as certain, that when the bridge is built they may destroy it for public purposes, on paying or providing for compensation. (*j*)

(*j*) West River Bridge Co. *v.* Dix, 6 How. 507. In 1795 the legislature of Vermont granted a charter to the plaintiffs for the term of one hundred years, which invested them with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. Under the authority of a subsequent act of the legislature, a public road was extended and established between certain termini, passing over the plaintiffs' bridge, converting it into a public highway, for which compensation was awarded. The new highway was laid out for two miles on one side, and one mile on the other, over a public highway, existing where the bridge was built, and of which it formed a part. It was held that the act appropriating the franchise of the bridge for the new public highway, compensation being made, was constitutional. *Daniel*, J., delivering the opinion of the court, said: "A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes, namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice *Blackstone*, when treating, in his second volume, chap. 3, page 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. *Vide* Bl. Comm. vol. iii. chap. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and

But can they not only authorize a party to make a bridge, but give to the same party, in express terms, the exclusive right to build a bridge within distant termini, on the one side and the other? This seems to be well settled; nor does it interfere with the eminent domain of the State, for this exclusive right would be a franchise, and this is a property, and it can therefore be taken for public purposes, that is, another bridge may be authorized within these same limits, on making compensation. (*k*)

But let us suppose the grant not to be in terms of any exclusive right; but simply a right to build a bridge from one spot to another; and that this grant contains a clause, promising on the part of the State, that no party shall ever be authorized to build another bridge within five miles, in

to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the State; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract. The power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court. But in England, this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast-Plate Manufacturers *v.* Meredith, 4 Term Reports, 794; and Lord *Kenyon*, especially, in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom." pp. 533, 534. *Woodbury*, J., in a concurring opinion, limited the power of eminent domain over the franchise of a corporation to cases where "the further exercise of the franchise, as a corporation, is inconsistent or incompatible with the highway to be laid out," and where also "a clear intent is manifested in the laws that one corporation and its uses shall yield to another, or another public use, under the supposed superiority of the latter, and the necessity of the case." pp. 543, 544, 546. The doctrine of the West River Bridge Co. *v.* Dix, that the franchise of a corporation may be taken by the State for public uses, or the power to take it for public uses, may be delegated by the State to another corporation, on providing compensation, is confirmed by numerous authorities. S. C. 16 Verm. 446; The Richmond, &c., R. R. Co. *v.* The Louisa R. R. Co. 13 How. 71; Boston Water Power Co. *v.* Boston and Worcester R. R. Co. 23 Pick. 360; Armington *v.* Barnet, 15 Vt. 745; White River Turnpike Co. *v.* Verm. Central R. R. Co. 21 Id. 591; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 41, 454; Barber *v.* Andover, 8 N. H. 398; Peirce *v.* Somersworth, 10 Id. 369; Backus *v.* Lebanon, 11 Id. 19; Rogers *v.* Bradshaw, 20 Johns. 735; Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 45; Lexington and Ohio R. R. Co. *v.* Applegate, 8 Dana, 289; Shorter *v.* Smith, 9 Geo. 517. And the legislature, in delegating this power to a railroad company, need not designate the specific land to be taken. Boston Water Power Co. *v.* Boston and Worcester R. R. Co. 23 Pick. 360.

(*k*) West River Bridge Co. *v.* Dix, 6 How. 507; Shorter *v.* Smith, 9 Geo. 529. The exclusive right is a part of the franchise, which may itself be taken. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35.

either direction, from either terminus. Would this promise be binding on future legislatures? (*l*) We confess that we think the question is one of some difficulty. If no future legislature can authorize another bridge within the five miles on payment of compensation, it must be because this legislature has granted away from the public, for all time, this right of eminent domain. We are clear they cannot do this. And if it be the certain effect of this promise that no such other bridge can hereafter be authorized on any terms, then we say the promise is void, because the legislature, as an agent, had made a contract which they had no authority whatever to make. But why may not a future legislature authorize another bridge, with compensation, in this case, as well as if an exclusive right had been given? The answer may be, that here no property whatever is given, and no franchise whatever; and nothing but a bare promise made. The bridge itself may be taken, for it is property, or the right to build the bridge may be taken, for this is a franchise, and a franchise is property, but no property passes by a mere promise that no other bridge shall be built; and if no property passes, there is nothing which can be taken in making compensation, and then there is no way of exercising this right of eminent domain, or, which is the same thing, this right of eminent domain has been transferred or destroyed, which, as we have seen, cannot legally be done. Such might be the argument, and although technical, we do not deny its force; nor shall we be able to answer this question with any certainty, until it is settled by further adjudication. But at present we regard it as a question between a technical view of the subject and a substantial view of it, and we are inclined to believe that the courts will construe such a grant with such a promise, as in fact a grant of an exclusive right, and will apply to it the same rule of law. (*m*)

(*l*) In the Richmond, &c. R. R. Co. *v.* The Louisa R. R. Co. 13 How. 71, 90, *Curtis*, J., contended for the power of the legislature to make such a contract, but the court declined to pass upon the question. See Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35, 69.

(*m*) The Enfield Toll Bridge Co. *v.* The Hartford & N. H. R. R. Co. 17 Conn. 40, 454. In the plaintiff's charter, granted in 1798, for the building of a bridge over Connecticut River, between Enfield and Suffield, it was provided that no person or persons should have liberty to build another bridge over that river, between the north line of En-

It must be remembered that the right of eminent domain authorizes the taking of private property by the sovereign, first, for public purposes; and second, on making or providing for compensation. But one of these conditions is as essential as the other; and it is only when both are regarded, that private property can lawfully be taken. It follows, therefore, that if there be no public necessity, there is no public right; and that land taken by the sovereign, without such necessity, although for compensation, is unlawfully taken. (*n*)

field and the south line of Windsor, during the continuance of the charter. The Legislature, in 1835, granted a charter to the defendants to construct a railroad from Hartford to the north line of the State and thence to Springfield, Mass., and to build a bridge across the Connecticut for the purposes of a railroad track exclusively; and it was also provided in the charter that nothing therein contained should be construed to prejudice or impair the rights then vested in the plaintiffs. The railroad was laid out in the most direct and feasible route, and the company proceeded to construct a bridge, for railroad purposes only, within the exclusive limits of the Enfield Toll Bridge. It was held that a railroad, though belonging to a "private corporation," is a "public use;" and the franchise of a toll-bridge "private property," within the meaning of the constitution; that the franchise of a toll-bridge may be taken for the purposes of a railroad, by granting compensation; that the covenant in this case was a part of the contract creating the corporation, and is a part of the franchise itself, and subject to the same laws; that the reservation in the defendant's charter, that nothing therein should be construed to impair the plaintiff's rights, did not protect them from the exercise of the power of eminent domain, but only secured them equal rights; the right to demand compensation, if their franchise should be impaired by the construction of the road. The case of the Boston & Lowell Railroad Co. *v.* The Salem & Lowell, the Boston & Maine, and the Lowell & Lawrence Railroad Companies, decided by the Supreme Court of Massachusetts, in Feb. 1855, but not yet published in Gray's Reports, turned upon a question quite similar to that considered in the text. In 1830 the plaintiffs were incorporated, to make a railroad from Boston to Lowell. The twelfth section of their charter enacted, "That no other railroad shall, within thirty years, be authorized to be made from Boston, Cambridge or Charlestown, to Lowell, or to any place within five miles from the northern termination of the Boston and Lowell Railroad." Afterwards the three defendant companies were successively incorporated; and by their junction and intersection, there was a direct railroad route from Lowell to Boston. And this action was a suit in equity, praying for an injunction against the defendants. The court did not decide that the acts incorporating the three defendant railroad companies were unconstitutional, for this obvious reason, that substantial use might be made of all these railroads without interfering with the plaintiff's; and no use of them, in terms, infringed upon the charter of the plaintiffs. But the court held that the charter of the Lowell Railroad was, in all its provisions constitutional, and legal, and that the three defendant railroads, by their conjunction, interfered with the rights secured by the charter of the Lowell Railroad, and on that ground granted the injunction prayed for.

(*n*) That if the public interest does not require it, private property cannot be taken for public uses, although compensation be provided. See Beekman *v.* The Saratoga & Schenectady R. R. Co. 3 Paige, 45; West River Bridge Co. *v.* Dix, 6 How. 543, 544, 546. Per *Woodbury*, J.: "The franchise of an existing highway cannot be taken for a new highway of the same character, laid out upon the old one; for that would be essentially transferring A's property to B."

Let us now recur to the question we first asked, whether a grant with a covenant that the property or franchise granted should be forever free from taxation, can be supported. Again, we admit that no certain answer can now be given to this question. But, as before, we say that if this covenant prevents all future taxation, in fact, it must be void; because every legislature has the right to determine what property shall be taxed, without regard to what may have been done by a preceding legislature, and without the power of binding a subsequent legislature. But this covenant or promise may be supported, and no such consequence follow; for the property thus exempted may be taxed, and compensation made. It might be said that it involves an absurdity to suppose a legislature laying a tax of an hundred dollars, and voting the same sum to be paid to the taxed party; and it must be precisely that sum, or it would not be compensation. And the effect would be only to put the State to the trouble and expense, first of collecting the tax and then of paying the money. But, while it may be true that if money be paid in compensation, it must be the same sum that is taken, it is not true that the compensation must necessarily be made in money. It is at least supposable, that there may be other modes of compensation equally just, satisfactory, and expedient. And then the whole case might be brought, by construction, within the principle of something given, which may be resumed upon compensation. The argument, that if the legislature are permitted to have this power, they might carry it to an excess which would seriously impair the resources of the public, applies as well to many of their important and unquestionable powers, of which the abuse is easy and might be very injurious. Moreover, if the exercise of this power, and in this way, was carried to an extreme, the grant or contract might perhaps be annulled, as constructive fraud. (*o*) For in such a case, it might be inferred, not only that the agent of the public is opposed to the will and injured the interests of his principal, but that this misconduct must

Boston Water Power Co. *v.* Boston & Worcester Railroad Corporation, 23 Pick, 393.

(*o*) Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 63, 64.

have been obvious to the party benefiting by it; and the general principles of agency and of contracts would avoid such a transaction. (*p*)

(*p*) In the State of New Jersey *v.* Wilson, 7 Cranch, 164, it was held that an act of the legislature of New Jersey, giving effect to an agreement between the tribe of the Delaware Indians and the commissioners of New Jersey, for an exchange of lands, and declaring that the lands to be purchased for the Indians "shall not hereafter be subject to any tax," by virtue of which the proposed exchange was subsequently effected, constituted a contract — and a law, repealing the section exempting the lands purchased from taxation, was held unconstitutional — although the Indians had, after the exchange, obtained a legislative act authorizing a sale of the lands, and when taxed they were owned by their vendees. *Marshall*, C. J.: "Every requisite to the formation of a contract is found in the proceedings between the colony of New Jersey and the Indians. The subject was a purchase on the part of the government, of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon; which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract, clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it." Of this case it has been observed that there was no restriction on the colonial government — that the right of the legislature to surrender or limit the taxing power so as to bind its successor, was not raised — and that it may be sustained on the ground that it was in the nature of a *treaty* with the Indians. Brewster *v.* Hough, 10 N. H. 143; Debolt *v.* The Ohio Life Insurance & Trust Co. 1 Ohio State R. 589. In Gordon *v.* Appeal Tax Court, 3 How. 133, the State of Maryland had passed acts pledging the faith of the State not to impose any further tax on certain banks, upon their accepting and complying with certain conditions, as subscribing for the construction of a road, which were duly accepted and complied with. It was held that the individual stockholders were thereby exempted from taxation for shares in the stock of the banks, and a law imposing such a tax was unconstitutional, as impairing the obligation of a contract. The construction of the statute exempting the banks, was the only question raised by the defendant's counsel, who maintained that it exempted merely the corporate franchise, and not the property of the banks, or the shares of the individual stockholders in the stock. This question of construction is the only one to which the opinion of the court is directed. In Providence Bank *v.* Billings, 4 Peters, 561, *Marshall*, C. J., speaking of the taxing power, said: "We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist." In Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 394, the court forbore to express an opinion on the question. The case of New Jersey *v.* Wilson, has been followed in Connecticut. Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 Id. 335; Parker *v.* Redfield, 10 Id. 495; Landon *v.* Litchfield, 11 Id. 251; Armington *v.* Barnet, 15 Vt. 751; Herrick *v.* Randolph, 13 Vt. 525. On the other hand the Supreme Court of New Hampshire has strongly intimated an opinion that the taxing power is an essential attribute of sovereignty, inherent in the people under a republican government, and that the legislature cannot exempt land from taxation so as to bind future legislation, without an express authority for that purpose in the constitution, or in some other way directly from the people themselves. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 69; Brewster *v.* Hough, 10 Id. 138; Backus *v.* Lebanon, 11 Id. 24. The Supreme Court of Ohio, in elaborate opinions, has recently held that the taxing power is a sover-

It is now well settled, and on obvious grounds, that the abandonment of the taxing power is not to be presumed, where the deliberate purpose of the State to relinquish it does not distinctly appear. (*q*) And, on the other hand, if the constitution of a State exempts property from taxation, the legislature cannot authorize its assessment. (*r*)

SECTION IV.

OF THE RELATION OF THIS CLAUSE TO MARRIAGE AND DIVORCE.

The effect of this clause upon the subject of marriage, or rather of divorce, has also been considered; but not yet fully ascertained and defined by adjudication. It has been contended that marriage is not a contract which comes within

eign right of the State, essential to its existence, delegated by the people to the General Assembly, to be used as a means to secure the ends of government, and that among the powers delegated to that body, there is none to surrender or limit this right so as to abridge the control of future legislation over it; that it has power to exercise it for the purposes for which it was granted, but no power over the right itself. Debolt *v.* Ohio Life Insurance & Trust Co. 1 Ohio State R. 563; Mechanics & Traders' Bank *v.* Debolt, Id. 591; Knoop *v.* The Piqua Bank, Id. 603; Toledo Bank *v.* Bond, Id. 622. But see Piqua Bank *v.* Knoop, 16 How. 369, in which the judgment of the State Court in the same case was reversed.

(*q*) A bank charter does not carry with it by implication an exemption from taxation. Providence Bank *v.* Billings, 4 Peters, 514, 561. *Marshall*, C. J.: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." The Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 376. *Taney*, C. J.: "This court, on several occasions, has held that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." Portland Bank *v.* Apthorp, 12 Mass. 252; Bank of Watertown *v.* Assessors of Watertown, 25 Wend. 486; S. C. 1 Hill, 616, 2 Id. 353; Brewster *v.* Hough, 10 N. H. 138; Gordon *v.* Baltimore, 5 Gill, 231; Herrick *v.* Randolph, 13 Vt. 525. Accordingly it has been held that where a charter prescribes the payment of a certain per cent. on the dividends of the corporation, as a tax, that is a temporary rule of taxation, which may afterwards be increased. Easton Bank *v.* Commonwealth, 10 Barr, 442; Debolt *v.* Ohio Life Insurance and Trust Co. 1 Ohio State R. 563; S. C. 16 How. 416. The legislature may exempt property from taxation for the time being, and a town cannot levy a tax upon it until the law exempting it is repealed. Brewster *v.* Hough, 10 N. H. 142; Capen *v.* Glover, 4 Mass. 305. But a town cannot, by a grant or stipulation in a conveyance, exempt property thereafter from taxation. Mark *v.* Jones, 1 Foster, N. H. 393.

(*r*) Hardy *v.* Waltham, 7 Pick. 108; Brewster *v.* Hough, 10 N. H. 144.

the scope of this clause; but it may be considered that it has been settled, that this clause *may* operate on the contract of marriage; leaving only the question as to what is the effect and operation of the clause. It might seem, on general principles, that if it be applicable at all, it must go so far as to prevent any divorce for reasons which were not sufficient ground for divorce when the marriage was contracted. Or, in other words, that a legislature might pass what law it would as to divorce, limiting its effect to marriages which should take place after the law was enacted. But that any law creating new grounds or new facilities for the divorce of parties married before the law was passed, would impair the obligation of the marriage contract, and therefore be void. But we have not sufficient adjudication for positively asserting this as law. (*s*) And in one very important case, in which, however, it is true that whatever touches marriage is spoken altogether *obiter*, it is implied that any divorce is valid which is granted for any cause which may be regarded as a breach of the marriage contract; for if this contract be broken, there is no obligation left to be impaired. (*t*) If this be so,

(*s*) It was held in Clark *v.* Clark, 10 N. H. 380, that a general law providing for the dissolution of existing marriages, for transactions occurring *subsequent* to its passage, which were not grounds of divorce when the marriage was contracted, is not within the prohibition of this clause of the constitution.

(*t*) Dartmouth College *v.* Woodward, 4 Wheat. 518. *Marshall*, C. J.: "The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Story*, J., pp. 695–697: "As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is a matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts recognized as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws, by private persons, are certainly contracts of civil institution. Yet no one ever supposed, that when acquired *bonâ fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. . . . A *general* law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing *the obligation of such a contract*. 3d John. Cas. 73. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been

the operation of this clause upon the contract of marriage, would be confined to preventing a divorce at the will of one party and against the will of the other party, and for no cause. It should be added that there is, at least, one judicial decision, that marriage is not only a contract, but much more than a contract, and so much more that it is not to be considered as within the scope or intention of this clause of the constitution. (*u*)

considered with reference to *general* laws regulating divorces, upon breaches of that contract. But if the argument means to assert, that the legislative power to dissolve such a contract, without *any breach on either side, against the wishes of the parties*, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made, (and marriage is always in law a valuable consideration for a contract,) it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition, as any other contract for a valuable consideration. A man has quite as good a right to his wife, as to *the property* acquired under a marriage contract. He has a legal right to her society and her fortune; and to divert such right without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate. I leave this case, however, to be settled when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument derived from this source does not impress my mind with any new and insurmountable difficulty." The *dictà* of *Story*, J., are ratified in Pouder *v.* Graham, 4 Florida, 23. In Holmes *v.* Holmes, 4 Barb. 295, it was held that as respects property the contract of marriage must stand upon the same footing as other contracts, and that where the husband, by virtue of the marriage relation or as incident thereto, becomes entitled to the property of the wife, a law passed subsequent to their marriage, and vesting her property solely in herself, as her own sole and separate property, is void as impairing the obligation of a contract.

(*u*) Maguire *v.* Maguire, 7 Dana, 183, 184. Per *Robertson*, C. J.: "Marriage, though in one sense a contract, because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, is nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And, therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either with or without the consent of *both* parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint or foreign control, consistently with the public welfare. And, therefore, marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties. So far as a dissolution of a marriage, by public authority, may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a breach

SECTION V.

OF THE RELATION OF THIS CLAUSE TO BANKRUPTCY AND INSOLVENCY.

The language of this clause is exceedingly general. It comprehends all contracts; and whatever may have been in the minds of the framers of the constitution (*v*) — and arguments have been strongly urged on this ground, to limit the operation of this clause — it is now quite settled that the clause is to be construed by itself, so far, at least, that there is no contract which a state law can affect, which is not within the prohibition. Hence a contract between two States is a contract in this sense and for this purpose. (*w*)

of the contract by the other, it is undoubtedly judicial." In White *v.* White, 5 Barb. 474, *Mason*, J., held that marriage is not a contract, in the common law or popular sense of the term, and that the relation of husband and wife is not within the prohibition of the constitution respecting contracts, and came to a conclusion adverse to that intimated by *Story*, J., in Dartmouth College *v.* Woodward. In Londonderry *v.* Chester, 2 N. H. 268, per *Woodbury*, J., marriage was held to be a mere civil contract.

(*v*) Dartmouth College *v.* Woodward, 4 Wheat. 518, 644, per *Marshall*, C. J.: "It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent occurrence to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

(*w*) Green *v.* Biddle, 8 Wheat, 1; Hawkins *v.* Barney, 5 Peters, 457. A contract of a State with an individual, whether it assumes the form of a grant or not, is a contract within the prohibition of the constitution. New Jersey *v.* Wilson, 7 Cranch, 164; Fletcher *v.* Peck, 6 Id. 87. *Marshall*, C. J.: "When, then, a law is in its nature a contract; when absolute rights have vested under the contract; a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." Winter *v.* Jones, 10 Geo. 190; Providence Bank *v.* Billings, 4 Peters, 560. In Woodruff *v.* Trafnall, 10 How. 190, the State of Arkansas chartered a bank of which it owned all the stock, and provided in the charter that the bills of the bank should be received in payment

This clause leaves no room for any question as to the degree in which the obligation of a contract is impaired, in order to come within the prohibition. Any change which bears injuriously upon the *obligation*, is fatal, and avoids the law which makes this change; but we shall find a very important distinction taken between the *obligation* of a contract, and the *remedy* upon the contract, when we come to the consideration of what must be our next topic, namely, the effect and operation of this clause upon the insolvent laws of the several States.

The constitution gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not *exclusive;* because the several States may also make distinct bankrupt laws, each State for itself. (*x*) In fact, however, no State has enacted a bankruptcy law under that name; but all or nearly all have insolvent laws, or at least laws making provision of some sort for cases of insolvency; and some of these insolvent laws seem to contain all the elements and characteristics which should entitle them to the name of bankrupt law. (*y*) But, on the one hand, our several States are distinct and independent sovereignties, and in some respects foreign to each other. Yet, on the other, the intercourse between the citizens of the several States, and the intimacy of their social and business relations, is as close and constant as between fellow citizens of the same government or the same city. From this circumstance there arises one very great difficulty in regard to the operation of these insolvent laws; and this is much increased when it is complicated with those which spring from the application of this prohibitory clause of the constitution. And such has been the sin-

of debts due the State; it was held that a contract subsisted between the State and the holders of the notes, and that a repeal of that provision could not affect notes in circulation at the time of the repeal, with which the holder might discharge any debt due from him to the State.

(*x*) Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Id. 213; Blanchard *v.* Russell, 13 Mass. 1. *Contrà.* Golden *v.* Prince, 3 Wash. C. C. 313.

(*y*) There seems to be no distinction between a bankrupt and an insolvent law, so far as the interpretation of this provision of the constitution is concerned. Sturges *v.* Crowninshield, 4 Wheat. 122. *Marshall*, C. J.: "The difficulty of discriminating with any accuracy between insolvent and bankrupt laws should lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

gular character of the adjudication upon this subject; the same courts presenting, in different cases, very different views of the same question; few of them of principal importance being decided with unanimity; and in some instances, different judges being led to identical conclusions by reasons which seem to be antagonistic; that we are hardly prepared to say that any one of these questions is as yet finally and positively settled.

Thus, the distinction is taken between the obligation and the remedy, both in the courts of the United States, and in those of the States. But we can hardly say what it means. If applied only to imprisonment of the person, there is at least no difficulty in understanding it; and then we begin with saying that a State may pass a valid act lessening or abolishing imprisonment for a debt contracted before the act; (z) and from this we may go on to sustain an insolvent law, which provides that there shall be no arrest of the person, (for if no imprisonment, it would be absurd to arrest) for any debt of one who comes under the protection of the law. This would suggest as the next question, whether everything of process as well as imprisonment, comes under the head of remedy, and not of obligation. It is not easy to draw, on principle, a distinct and unquestionable line here. Imprisonment is the last and most effectual remedy; but it is only the last of many successive steps, which are linked together in unbroken series. The first step may be arrest of the person, or attachment of the goods, or only the summons or a command to pay the debt, like the old original writ. Whatever it may be, it is not easy to see why it is not of the same nature, and under the same category, as the last step to which it leads. In other words, is not all resort to law used for the purpose of obtaining the remedies of the law; and are not civil processes parts of these remedies, differing only as they belong to different stages of the process, and to different degrees in the recusancy of the debtor. If so, every State has perfect power over all its processes; and therefore it may pro-

(z) Sturges *v.* Crowninshield, 4 Wheat. 122; Mason *v.* Haile, 12 Id. 370; Beers *v.* Haughton, 9 Peters, 359; Gray *v.* Munroe, 1 McLean, 528; Stair *v.* Robinson, 1 Chip. 257; Fisher *v.* Lacky, 6 Blackf. 373; Woodfin *v.* Hooper, 4 Humph. 13; Bronson *v.* Newberry, 2 Doug. 38.

vide as to any debt, that no process shall ever after issue, by which any thing of compulsion shall be exerted upon the debtor, and it shall be left entirely to his own discretion and pleasure as to the payment of the debt; and this law is protected by this view of the constitution of the United States, because it does not impair the obligation of that debt. It is at least equally difficult to deny that the courts have made and perhaps established this distinction between the remedy and the obligation, or to avoid these conclusions, as logical if not legal. But a distinction is taken here, and on so much authority, that it may be regarded as established. It is, that while exemption from arrest, or from imprisonment, affects only remedy, an exemption of the property from attachment, or a subjection of it to a stay-law, or appraisement law, impairs the obligation of the contract. And such a statute can be enforced only as to contracts made subsequently to the law. (*a*) At the same time, how-

(*a*) There has of late been a tendency in the courts of the United States, to render the distinction between the *obligation* and the *remedy* to a great extent inoperative, by regarding the remedy to be so connected with the obligation, as in many respects to be a part of it, and holding unconstitutional such legislation on remedies existing at the time the contract was made, as, by a change of the remedy, takes away or materially impairs the creditor's rights. Bronson *v.* McKenzie, 1 How. 311. See Green *v.* Biddle, 8 Wheat. 1, 75. Thus a law of the State of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it would bring two thirds of its valuation according to the appraisement of three householders, was held, as regards contracts made prior to its passage, unconstitutional. McCracken *v.* Haywood, 2 How. 608, 612. Per *Baldwin*, J.: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract, more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." And again, 613, 614: "The obligation of the contract between the parties in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against

ever, it is admitted that a State may make partial exemptions of property, as of furniture, food, apparel, or even a homestead. (*b*)

It is to be observed, on this point, that there can be no difference between a debt existing before and one contracted after the law is made. There may be a difference as to the propriety or expediency of the law, but none as to the right of the State to pass the law; for this right is perfect, except so far as it is controlled by this clause in the constitution. And on this ground it has been held that nothing in the constitution of the United States prevented a State from passing a valid law to divest rights which had been vested by law in an individual, because this was not a contract. (*c*)

the defendant, till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant has made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale, on reasonable notice, it would have conferred a right on the plaintiff, which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a State legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three fourths, or nine tenths, as well as for two thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy, which are regardless of the effect on the right of the plaintiff. These cases have been the subject of much comment in the State courts. See cases cited in the next note.

(*b*) It has been held in New York, that a law exempting property of the debtor from execution, which was liable to execution when the debt was contracted, is unconstitutional. Quackenbush *v.* Danks, 1 Den. 128; S. C. 3 Id. 594. In the court of appeals the judges were equally divided on the question, and the judgment of the Supreme Court was affirmed. 1 Comst. 129; Vedder *v.* Alkenbrack, 6 Barb. 327. On the other hand, it is held in Michigan, that property may be exempted from execution for debts contracted before the law of exemption was enacted. Rockwell *v.* Hubbell, 2 Doug. 38. See Bronson *v.* Newberry, 2 Id. 38; Evans *v.* Montgomery, 4 W. & S. 218; Bamgardener *v.* The Circuit Court, 4 Miss. 50; Tarpley *v.* Hamer, 9 S. & M. 310.

(*c*) Calder *v.* Bull, 3 Dall. 386; Satterlee *v.* Mattherson, 2 Peters, 412; Watson *v.* Mercer, 8 Id. 89; Charles River Bridge *v.* Warren Bridge, 11 Peters, 549, 540; Baltimore and Susquehannah R. R. Co. *v.* Nesbit, 10 How. 395; White *v.* White, 5 Barb. 48; Baugher *v.* Nelson, 9 Gill, 299. So in Wilson *v.* Hardesty, 1 Mary. Ch. 66, it was *held* that a law which limited the defence to a usurious contract to the excessive interest, was valid, although at the time the contract was made there was a law declaring such a contract absolutely void.

We have, therefore, to inquire which of these insolvent laws affect only the remedy, and which go further and discharge the debt. It may be found that most are in the nature, or use the language, of a *cessio bonorum*, leaving the debt still existing; some, however, discharge it altogether. And perhaps it may be gathered from the adjudications, up to this time, that an insolvent law of a State, which discharges the debt, is valid only as it refers to contracts made after the law was passed; and that if an insolvent law makes no distinction in this respect, it would be construed as intended only to apply to subsequent debts, and therefore as valid; but if it purports expressly to discharge existing and antecedent debts, it is for this reason void and of no effect whatever. (*d*) And if it does not discharge the debt, but only exempts the person from imprisonment, if he surrenders all his property for all his debts, this is valid, because it affects only remedy; and it would seem to be valid equally whether it applies to all existing debts or only to subsequent debts. (*e*) On the other hand, if it not only exempts the person from imprisonment, but also the property from attachment on mesne process and on execution, this would be held void as against the constitution, because it impaired the obligation of the contract. But as we have already intimated, we say this on authority, without undertaking either to maintain or to define this distinction, on reason or on principle, any further than to remark, that a doctrine which would go far to reconcile the cases, and which may have a practical value though not much logical precision, would be this: legislation on the remedies of prior contracts would be constitutional, provided its modification of these remedies still leaves substantial and efficient means of enforcing them. (*f*)

It seems to be settled that a State insolvent law operates in favor of its citizens who are insolvent — whether as to

(*d*) Sturges *v.* Crowninshield, 4 Wheat. 122; McMillan *v.* McNiel, 4 Id. 209; Ogden *v.* Saunders, 12 Id. 213; Boyle *v.* Zacharie, 6 Peters, 348; Planters Bank *v.* Sharp, 6 How. 328; Mather *v.* Bush, 16 Johns. 233; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Blanchard *v.* Russell, 13 Mass. 1; Kimberly *v.* Ely, 6 Pick. 440; Norton *v.* Cook, 9 Conn. 314; Smith *v.* Parsons, 1 Ham. (Ohio,) 236.

(*e*) See cases cited *ante*, note (*z*.)

(*f*) Sturgis *v.* Crowninshield, 4 Wheat. 122; James *v.* Stall, 9 Barb. 482; Bruce *v.* Schuyler, 4 Gilm. 221, 227; Stocking *v.* Hunt, 3 Denio, 274; Howard *v.* Kentucky & Louisville M. Ins. Co. 13 B. Munroe, 285.

remedy or as to obligation — only as to other citizens of the same State; (*g*) and not against citizens of other States, who have not assented to the relief or discharge of the debtor, expressly, or by some equivalent act, as becoming a party to the process against him under the law, taking a dividend, and the like. (*h*) Such has been the ruling of the courts of the United States. In the State Courts this has not always been adopted, and these courts have therefore refused to aid a citizen of another State, in enforcing a debt against a citizen of their own State, where the debt was discharged by their insolvent law. And in such case the creditor was obliged to resort to the courts of the United States, within that State. (*i*)

SECTION VI.

OF THE MEANING OF THE WORD "OBLIGATION" IN THIS CLAUSE.

A question, not the same with those we have considered, yet closely akin to them, has been much discussed. It is, what does the term "obligation" in this clause, include? The importance of the question rests mainly on the distinction which has been drawn between the laws of a State which were in force at the time the contract was made, and those

(*g*) McMillan *v.* McNeil, 4 Wheat. 209; Ogden *v.* Saunders, 12 Id. 213; Cook *v.* Moffat, 5 How. 295; Van Reimsdyk *v.* Kane, 1 Gall. 371; Hinkley *v.* Marcau, 3 Mason, 88; Baker *v.* Wheaton, 5 Mass. 509; Watson *v.* Bourne, 10 Id. 337; Bradford *v.* Farrand, 13 Id. 18; Walsh *v.* Farrand, Id. 19; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Norton *v.* Cook, 9 Conn. 314. But a discharge by the bankrupt law of a State within which the contract was made, and of which the debtor was a citizen when it was made, is a good bar to an action brought in another State. Blanchard *v.* Russell, 13 Mass. 1. So also where the discharge was granted in a State where the contract was made between the citizens of that State, and the action was brought in another State. Pugh *v.* Bissell, 2 Blackf. 366. See May *v.* Breed, 7 Cush. 15; where it was *held* that a discharge under the English bankrupt law, of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in that State, whether the debtor proved his debt under the English commission of bankruptcy or not.

(*h*) Clay *v.* Smith, 3 Peters, 41. But see as to assent, Kimberly *v.* Ely, 6 Pick. 440; Agnew *v.* Pratt, 15 Id. 417.

(*i*) Babcock *v.* Weston, 1 Gall. 168. On the relation of the insolvent laws of one State to the rights or remedies of citizens of other States, see Braynard *v.* Marshall, 8 Pick. 194; Norton *v.* Cook, 9 Conn. Rep. 314; Pugh *v.* Bussell, 2 Blackf. 394; Woodhull *v.* Wagner, 1 Baldwin, C. C. R. 296; Browne *v.* Stackpole, 9 N. H. 478.

which are subsequently enacted. The latter may certainly impair this "obligation," while the former, as it is contended, certainly cannot, because all existing laws enter into contracts made under them, and define and determine that contract. Upon this principle, the insolvent laws of a State, which on certain terms discharged all remedies on contracts made after its passage, between the citizens of the State, have been held to be constitutional. Those who hold to the distinction maintain that the "obligation" of the contract consists in the municipal law existing at the time the contract is made, (*j*) or perhaps in a combination of the moral, natural, and municipal law, (*k*) while those who deny the distinction, insist that the "obligation" consists in the universal law of contracts, which is unaffected by municipal

(*j*) "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." Sturges *v.* Crowninshield, 4 Wheat. 122. *Marshall*, C. J.: "What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of Sturges *v.* Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced." Ogden *v.* Saunders, 12 Wheat. 257, 259, per *Washington*, J. *Thompson*, J., p. 302, citing the extract from Sturges *v.* Crowninshield, said: "That is, as I understand it, *the law of the contract forms its obligation*; and if so, the contract is fulfilled and its obligation discharged by complying with whatever the existing law required in relation to such contract; and it would seem to me to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency." And per *Trimble*, J., p. 318: "From these authorities, and many more might be cited, it may be fairly concluded, that the obligation of the contract consists in the *power and efficacy* of the law which applies to and enforces performance of the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term obligation."

(*k*) "Right and obligation are considered by all ethical writers as correlative terms. Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured, neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three, — an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law." 12 Wheat. 281, per *Johnson*, J.

law, and is not itself conferred or created by positive law, but derived from the agreement of the parties. (*l*)

The question has also been raised, whether this clause of the constitution limits or affects the power of the State to enact general police regulations for the preservation of the public health and morals. Thus, if a legislature grant a charter to a corporation to hold land for the purpose of burying the dead within the limits of a city; can a subsequent legislature, for the purpose of preserving the health of the city, prohibit all persons from burying the dead within the limits of the city, and by this prohibition render their former grant useless and inoperative? Or can a legislature, having authorized an individual or a company to raise a certain sum of money by lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the public morals, recall such authority or license, by a general law, prohibiting lotteries, or the sale of spirituous liquors? And if this can be where the grant or license was gratuitous, can it also be done if a certain price or premium was paid for it? While the authorities are not uniform, we consider the prevailing adjudication of this country to favor the rule, that such general laws are not, in either case, within the purview or prohibition of the constitution. (*m*) If nothing is paid for the license or the authority, the authorities are quite uniform that it may be taken away by such general law. But where a fee or premium has been paid, there are cases which hold this to constitute a contract that is binding on both parties. (*n*)

It is certain that a State may pass an act limiting the time within which existing rights of action shall be barred. But

(*l*) "Contracts have consequently an intrinsic obligation. . . . No State shall 'pass any law impairing the obligation of contracts.' These words seem to us to import that the obligation is intrinsic; that it is created by the contract itself, not that it is dependent on the laws made to enforce it." Ogden *v.* Saunders, 12 Wheat. 350, 353, per *Marshall*, C. J.

(*m*) Phalen's case, 1 Rob. (Va.) 713; Phalen *v.* Virginia, 8 How. 163; Hirn *v.* The State of Ohio, 1 Ohio State R. 15; Baker *v.* Boston, 12 Pick. 194; Vanderbilt *v.* Adams, 7 Cowen, 349; Coates *v.* The Mayor &c. of New York, Id. 585; see 24 Am. Jurist. 279, 280.

(*n*) State of Missouri *v.* Hawthorne, 9 Missouri, 389. See Freleigh *v.* The State, 8 Id. 607; State *v.* Sterling, Id. 697; State *v.* Phalen, 3 Harrington, 441; 4 Id. 427.

a reasonable time must be given after its passage, within which they may be enforced. (*o*)

Cases have also arisen under the clause of the constitution of the United States, which relates to the regulation of commerce by congress. In these cases the supreme court appear to recognize the validity of police regulations or statutes which indirectly affect the exercise of powers, which, by the constitution, belong exclusively to congress. (*p*) We do not refer to these questions, however, particularly, as they do not seem to come within the scope of the Law of Contracts.

(*o*) Sturges *v.* Crowninshield, 4 Wheat. 122, 207. *Marshall*, C. J.: "If in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence not barred by the statute should be construed to be within it, there could be little doubt of its unconstitutionality." Jackson *v.* Lamphire, 3 Peters, 290; Bronson *v.* McKenzie, 1 How. 311; McCracken *v.* Haywood, 2 Id. 608; Society, &c. *v.* Wheeler, 2 Gall. 141; Call *v.* Hagger, 8 Mass. 430; Blackford *v.* Peltier, 1 Blackf. 36; Proprietors of Ken. Purchase *v.* Laboree, 2 Greenl. 293; Beal *v.* Nason, 14 Maine, 344; Griffin *v.* McKenzie, 7 Geo. 163; West Feliciana R. R. Co. *v.* Stockett, 13 S. & M. 395; Butler *v.* Palmer, 1 Hill, 328; Pearce *v.* Patton, 7 B. Munr. 162; James *v.* Stull, 9 Barb. 489; see *Story*, Comm. Const. § 1379.

(*p*) Smith *v.* Turner, 7 Howard, 283, as to the state taxes on passengers. Thurlow *v.* Massachusetts, 5 Howard, 504, as to the laws of Massachusetts, of Rhode Island, and of New Hampshire, prohibiting the sale of spirituous liquors. New York *v.* Mien, 11 Peters, 102, as to statute of New York prescribing sundry regulations as to passengers brought to that State.

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